Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 737; MARTHA POSTON; VIRGINIA LIGON; SUE DOSS; BRENDA MALEY; GLYNDA JOHNSON; TAMALA LAVENDER; LUCY PINSON; JANICE WEATHERLY; PHYLLIS LAW; DIANE ARMONAT; and MARY PEOPLES,

Petitioners,

v.

AUTO GLASS EMPLOYEES FEDERAL CREDIT UNION, NATIONAL CREDIT UNION ADMINISTRATION BOARD; and H. ALLEN CARVER,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the United States

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the lower courts err in holding that the National Credit Union Administration Board (the "NCUAB") applied the appropriate standard in repudiating the collective bargaining agreement between the Auto Glass Employees Federal Credit Union (the "AGEFCU") and the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, Local 737 (the "Union" or "Local 737")?

2. Did the lower courts err in holding that the Federal Credit Union Act (the "FCUA") authorizes repudiation of collective bargaining agreements?

3. Did the lower courts err in dismissing Defendant, H. Allen Carver, from the action, despite claims that Mr. Carver's conduct, including repudiation of the collective bargaining agreement between Local 737 and AGEFCU, violated Plaintiffs' constitutional rights of freedom of association and due process?

4. Did the lower courts err in holding that Plaintiffs had no property interest in their employment created by the collective bargaining agreement between Local 737 and AGEFCU?

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LOWER COURT OPINIONS

The opinion of the United States Court of Appeals for the Sixth Circuit is published at 72 F.3d 1243 (6th Cir. 1996). (App. at p. 1a). The decision of the District

Court is published at 859 F. Supp. 711 (M.D. Tenn. 1994). (App. at p. 19a).

JURISDICTION

Petitioners seek review of the decision of the Court of Appeals for the Sixth Circuit filed on January 9, 1996 (App. at p. 1a), affirming the Orders of the District Court for the Middle District of Tennessee entered on September 26, 1994 (App. at p. 46a), and June 22, 1994 (App. at p. 48a). In an Order dated February 23, 1996, the Court of Appeals for the Sixth Circuit denied Appellants' Motion for Rehearing En Banc (App. at p. 50a).

Jurisdiction of this Court to review the Order of the Court of Appeals is pursuant to 28 U.S.C. § 1254(1) (1988). The Court of Appeals had jurisdiction over Plaintiffs' appeal pursuant to 29 U.S.C. § 1291 (1966). The District Court had jurisdiction over Plaintiffs' claims that Defendants violated the United States Constitution and federal statutory law under 28 U.S.C. § 1331 (1993). The District Court properly asserted supplemental jurisdiction over Plaintiffs' pendent state law claims pursuant to 28 U.S.C. § 1367 (1993).

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

UNITED STATES CONSTITUTION

First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the fee exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment:

> No person shall . . . be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TENNESSEE STATE CONSTITUTION

Article I, § 23:

> **Right of assembly.** That the citizens have a right, in a peaceable manner, to assemble together for their common good, to instruct their representatives, and to apply to those invested with the powers of government for redress of grievance, or other proper purposes, by address or remonstrance.

FEDERAL STATUTES

29 U.S.C. § 157:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .

29 U.S.C. § 158(a), (d):

(a) Unfair Labor Practices by Employer. It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7];

. . .

(5) to refuse to bargain collectively with the representation of employees.

. . .

(d) Obligation to Bargain Collectively. For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, that where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party denying such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, . . .; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of the contract, which ever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) . . . shall not be construed as requiring either party to discuss or agree to any modification of the terms or conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. . . .

12 U.S.C. § 1787(b)(2)(G):

Incidental powers.

The Board may, as conservator or liquidating agent—

(i) exercise all powers and authorities specifically granted to conservators or liquidating agents, respectively, under this chapter and such incidental powers as shall be necessary to carry out such powers; and

(ii) take any action authorized by this chapter, which the Board determines is in the best interests of the credit union, its account holders, or the Board.

12 U.S.C. § 1787(c)(1):

Provisions relating to contract entered into before appointment of conservator or liquidating agent.

(1) Authority to repudiate contracts:

In addition to any other rights a conservator or liquidating agent may have, the conservator or liquidating agent for any insured credit union may disaffirm or repudiate any contract or lease—

(A) to which such credit union is a party;

(B) the performance of which the conservator or liquidating agent, in the conservator's or

liquidating agent's discretions, determines to be burdensome; and

(C) the disaffirmance or repudiation of which the conservator or liquidating agent determines, in the conservator's or liquidating agent's discretion, will promote the orderly administration of the credit union's affairs.

STATEMENT OF THE CASE

A. Relevant Facts.

This case arises out of the conservatorship takeover of the Auto Glass Employees Federal Credit Union ("AGEFCU" or "Credit Union") by the National Credit Union Administration Board ("NCUAB"). The individual Plaintiffs are former employees of the Credit Union. Plaintiff, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 737 ("Union" or "Local 737"), represents employees of the AGEFCU, including the individually named Plaintiffs, as their collective bargaining agent. The Defendant, NCUAB, is a federal agency authorized to manage the National Credit Union Administration in enforcing the provisions of the Federal Credit Union Act ("FCUA"). Defendant, H. Allen Carver, is the Regional Director for the NCUAB.

On December 16, 1991, the Defendant, NCUAB, ostensibly acting pursuant to its authority under the FCUA, issued an Order of Conservatorship over the Defendant, AGEFCU. At the time the conservatorship was established, a collective bargaining agreement, negotiated between the Credit Union and Local 737, governed the relationship of the AGEFCU with its non-management employees, including the individually named Plaintiffs. As conservator, the NCUAB assumed all of the operations of the AGEFCU.

Following the takeover of the Credit Union, Defendants began dealing directly with its employees and making

unilateral changes in the terms and conditions of employment affecting bargaining unit employees. Changes included altering the employee dress code, converting the offices to a smoke-free environment, changing employee insurance benefits and premiums, and abolishing the grievance procedure set forth in the collective bargaining agreement.

On July 28, 1992, representatives of the Union met with Defendants' agent and informed him that Defendants were violating the collective bargaining agreement between the AGEFCU and Local 737. The Union demanded that AGEFCU negotiate any changes in working conditions. At a later meeting on March 13, 1992, Defendants presented proposed changes to the collective bargaining agreement to Union representatives. The Union was informed that if it did not agree to accept the proposed changes, the conservator would repudiate the collective bargaining agreement.

On March 20, 1992, the conservator gave the Union written notice that it was repudiating the collective bargaining agreement pursuant to its powers under the FCUA. Following the repudiation, a new schedule of wages and benefits went into effect, by which several employees received a cut in wages. Several other employees were terminated, were constructively discharged, or were laid off. The conservator further halted the deduction of union dues and pension contributions, and terminated the Pension Plan.

In an effort to find a forum in which its grievances might be heard, the Union filed charges with the National Labor Relations Board and the Federal Labor Relations Authority. Both declined to exercise jurisdiction over the dispute. Appeals to both agencies were likewise denied. Union members were forced to relinquish all rights, both financial and non-financial in nature, guaranteed them under the collective bargaining agreement, without the benefit of any hearing whatsoever.

In response, Plaintiffs filed suit in District Court asserting claims under the United States Constitution, Federal Law and Tennessee State Law.

B. Proceedings Below.

On September 14, 1992, Plaintiffs filed a Complaint in the U.S. District Court for the Middle District of Tennessee against AGEFCU and the NCUA, alleging several statutory and constitutional violations.[1] The Court subsequently allowed Plaintiffs to join the NCUAB and H. Allen Carver, Regional Director and Agent of the NCUA, as Defendants. An Amended Complaint was filed on March 9, 1993, adding as Defendants both the NCUAB and Carver individually and in his official capacity as Agent of the NCUA.

On March 30, 1993, Defendants, NCUA and Carver in his individual capacity, filed a Motion to Dismiss Plaintiffs' action pursuant to Fed. R. Civ. P. 12(b)(6). By order, the Court referred the Motion to a Magistrate for consideration and, pursuant to the Magistrate's Report and Recommendations (App. at p. 53a), the Court dismissed Plaintiffs' action as to Defendants NCUA and Carver in his individual capacity. (App. at p. 51a).

Plaintiffs' Motion to File a Third Amended Complaint was granted by the Court on August 12, 1993. In addition to adding claims on behalf of certain Plaintiffs under Title VII and the Age Discrimination in Employment Act, Plaintiffs' Third Amended Complaint specifically alleged that Defendant, H. Allen Carver, made the decision to repudiate the collective bargaining agreement in its en-

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[1] The original Complaint alleged violations of the First and Fourteenth Amendments to the United States Constitution, Article 1 § 23 of the Tennessee State Constitution, the FCUA, the Labor Management Relations Act ("LMRA"), and the Employee Retirement Income Security Act. An Amended Complaint further alleged a violation of the Fifth Amendment of the United States Constitution.

tirety.[2] Despite Plaintiffs' request that the Court reconsider the Magistrate's findings, the Court adopted the Magistrate's Report and Recommendations in its entirety. (App. at p. 51a).

On August 17, 1993, Defendants moved for partial summary judgment alleging in part that the issue of whether the Defendants violated applicable provisions of the FCUA and NLRA should be decided as a matter of law.[3] Likewise, on September 9, 1993, Plaintiffs moved for partial summary judgment. In the Memorandum and Supplemental Memorandum Plaintiffs filed in support of their Motion, Plaintiffs asked the Court to decide whether the Defendants violated applicable provisions of the FCUA and applicable labor law as a matter of law.

On June 22, 1994, Judge Thomas A. Higgins entered an Order on the parties' Motion for Summary Judgment. (App. at p. 48a). Specifically with regard to the issues presently on appeal, Judge Higgins dismissed Plaintiffs' claim that Defendants' repudiation of the collective bargaining agreement violated the FCUA or any applicable standard established under federal labor law. (App. at p. 49a).

The remaining claims against the Defendants were dismissed by Stipulation of Dismissal entered on September 23, 1994, and on September 26, 1994, Judge Higgins

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[2] Although Plaintiffs' Third Amended Complaint had not been filed at the time the Magistrate recommended dismissing Carver in his individual capacity, the Magistrate was advised at hearing that Plaintiffs' Proposed Amended Complaint would include the specific allegation that Carver made the decision to repudiate the collective bargaining agreement. In any event, the Magistrate's Report and Recommendations states that for purposes of deciding Defendants' Motion to Dismiss, he attributed each of the acts alleged in Plaintiffs' Complaint to Defendant, Carver (App. at p. 61a).

[3] Defendants also moved for summary judgment with regard to other issues that are not raised on appeal.

entered an Order terminating the case and entering final judgment (App. at 46a).

On October 3, 1994, Plaintiffs filed their Notice of Appeal, and on October 11, 1994, Plaintiffs filed an Amended Notice of Appeal. The appeals were consolidated by order on November 15, 1994. Briefs were submitted by both parties and oral argument was heard on November 17, 1995. In a decision filed on January 9, 1996, three members of the United States Court of Appeals for the Sixth Circuit affirmed the lower court's opinion. (App. at p. 1a). Plaintiffs filed a petition for rehearing and suggestion for rehearing en banc which was denied on February 23, 1996. (App. at p. 50a).

ARGUMENT

I. THE NCUAB FAILED TO APPLY THE APPROPRIATE STANDARD IN REPUDIATING THE COLLECTIVE BARGAINING AGREEMENT.

The case at bar is one of first impression. There is no reported case law specifically addressing the issue of a conservator's right to repudiate a collective bargaining agreement pursuant to 12 U.S.C. § 1787(c)(1) of the FCUA as it conflicts with an employee's right to collectively bargain pursuant to 29 U.S.C. § 157 of the LMRA. At issue is the question of whether the federal government, ostensibly acting pursuant to FCUA provisions pertaining to the repudiation of contracts, can unilaterally repudiate a collective bargaining agreement without first considering the statutorily, even constitutionally, protected rights of bargaining unit employees. It is Plaintiffs' position that Congress never intended collective bargaining agreements to be included as contracts subject to a conservator's repudiation under the FCUA. Plaintiffs' moreover contend that, even if the FCUA does authorize repudiation of a collective bargaining agreement under certain circumstances, the law requires application of a stricter standard of consideration than the one applied by the NCUAB.

When Congress enacted the National Labor Relations Act ("NLRA"), it sought to establish basic rules for collective bargaining in an effort to ensure the stability of labor management relations and to avoid industrial strife. At the core of the NLRA is the collective bargaining agreement. Case law has consistently attested to the unique role of the collective bargaining agreement and to the fact that a collective bargaining agreement is not simply an executory contract into which two parties enter by mutual consent. This Court has stated:

> [A] collective bargaining agreement is not an ordinary contract. . . . [I]t is a generalized code to govern a myriad of cases which the draftsman cannot wholly anticipate. . . . The collective bargaining agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant. . . . Central to the peculiar status and functions of a collective bargaining agreement is the fact, dictated both by circumstance . . . and by the requirements of the National Labor Relations Act, that it is not in any real sense the simple product of a consensual relationship. *John Wiley and Sons v. Livingston*, 376 U.S. 543, 550 (1964).

In *NLRB v. Bildisco*, 465 U.S. 513 (1984), this Court examined the question of unilateral repudiation of a collective bargaining agreement in the context of a conflict between the NLRA and the then recently enacted Bankruptcy Code. In the *Bildisco* case, a bankruptcy trustee approved the repudiation of a collective bargaining agreement between a debtor-in-possession and a labor union. The Bankruptcy Code provision at issue stated that a trustee, subject to the Court's approval, could assume or reject any executory contact or unexpired lease of the debtor. 11 U.S.C. § 365 (1993). The repudiation was contested on the theory that a collective bargaining agreement was not an "executory contract" subject to repudiation under the Bankruptcy Code and that even if it were,

given the collective bargaining agreement's unique status, a simple business judgment standard was not sufficient to show cause for repudiation.

Although the Court determined that a collective bargaining agreement was an "executory contract" subject to the trustee's repudiation authority under the Bankruptcy Code, it also held that "because of the special nature of a collective bargaining contract, and consequent 'law of the shop' which it creates, . . . a somewhat stricter standard should govern the decision . . . to allow rejection of the collective bargaining agreement." *Bildisco, supra*, at 524. The Court stated that a Bankruptcy Court should permit rejection of a collective bargaining agreement only if "there is a showing that the collective bargaining agreement burdens the estate, *and that after careful scrutiny, the equities balance in favor of rejection of the labor contract.*" (Emphasis added). *Bildisco, supra*, at 526. The Court further stated that prior to approving the rejection of a collective bargaining agreement, the Bankruptcy Court,

> should be persuaded that reasonable efforts to negotiate a voluntary modification have been made and are not likely to produce a prompt and satisfactory solution. Not only is the debtor-in-possession under a duty to bargain with the union under section 8(a)(5) of the NLRA (citation omitted), but the national labor policies of avoiding labor strife and encouraging collective bargaining (citation omitted), generally require that employers and unions reach their own agreements on terms and conditions of employment free from governmental interference, citing *Howard Johnson Company v. Hotel Employees*, 417 U.S. 249 (1974), *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). *Bildisco, supra.*

The Court instructed that the decision to reject a collective bargaining agreement must be made only after balancing the interests of the affected parties and after considering the equities in relationship to the purpose of

the bankruptcy legislation, which is the successful rehabilitation of the debtor. *Bildisco, supra.*

In the case at bar, the standard applied by the NCUAB as conservator was simply whether the collective bargaining agreement was burdensome and whether repudiation would "promote the orderly administration of the credit unions affairs" 12 U.S.C. § 1787(c)(1)(B)(C). Even if the collective bargaining agreement is a "contract" subject to repudiation under the FCUA, however, clearly this Court's decision in the *Bildisco* case requires some consideration of the rights guaranteed to affected employees under the NLRA. The standard applied by the NCUAB never obligated it to give even a moment's reflection on the legally protected rights of credit union employees. No distinction was made between the agreement's financial and non-financial provisions.[4] In the *Bildisco*, decision, this Court mandated that the standard applicable to a decision to repudiate a collective bargaining agreement include consideration for the rights guaranteed by Congress under federal labor law. In determining whether the collective bargaining agreement was burdensome, the NCUAB was not free to ignore the considerations this Court set out in the *Bildisco* case. Instead, the standard has been incorporated into the requisite showing necessary for repudiation of a collective bargaining agreement under the FCUA's repudiation provision. The lower courts erred in holding the NCUAB did not violate the FCUA by failing to meet the standard applicable to the repudiation of collective bargaining agreements. (App. at pp. 13a, 32a).

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[4] An example of the Defendants' indifference to the rights of its employees is the fact that the collective bargaining agreement was repudiated in its entirety. Non-financial items such as the right of employees to be terminated for just cause only or the right to have grievance hearings were abolished along with the allegedly burdensome financial provisions.

II. THE FCUA DOES NOT AUTHORIZE REPUDIATION OF COLLECTIVE BARGAINING AGREEMENTS.

As has been previously stated, a collective bargaining agreement is no ordinary contract. It holds a unique and critical role in maintaining the stability of labor relations. Congress never intended for a federal agency to use its power to obliterate the rights it has consistently guaranteed employees pursuant to federal labor legislation. A collective bargaining agreement should not be included as a "contract" subject to repudiation under the FCUA.

Although this Court determined that a collective bargaining agreement was an "executory contract" subject to repudiation under the Bankruptcy Code, it relied as a basis for its decision on the fact that the Bankruptcy Code specifically excluded collective bargaining agreements under the Railway Labor Act ("RLA") from the repudiation authority of the bankruptcy trustee. *Bildisco, supra,* at 523. The Court noted that there was no similar exclusion for collective bargaining agreements under the NLRA. The Court reasoned that since Congress specifically excluded only collective bargaining agreements under the RLA, those are the only collective bargaining agreements that Congress intended to exempt. The Court stated that Congress's failure to draft a specific exclusion for collective bargaining agreements under the NLRA indicated, "that Congress intended that [the repudiation provision] apply to collective bargaining agreements covered by the NLRA." *Bildisco, supra.*

Although the FCUA contains some provisions exempting a few types of contracts from the repudiation authority of the conservator, none of the exemptions address contracts matching the legal or policy significance of collective bargaining agreements. There is simply no statutory provision that indicates that Congress specifically intended collective bargaining agreements to be subject to repudiation by a conservator under the FCUA.

It is more likely that Congress never considered the impact of the FCUA on labor management agreements, since the majority of credit union employees are non-union, and organized credit union's are rare.

The fact that Congress cannot possibly predict or anticipate every factual permutation that might be impacted by a piece of legislation is evidenced by its reaction to the Court's holding in the *Bildisco* case. Only a few months after this Court published its decision, Congress amended the Bankruptcy Code to specifically exclude collective bargaining agreements under the NLRA from those contracts subject to repudiation. Although the amendment is but a small part of the Bankruptcy Amendments and Federal Judgeship Act of 1984,[5] a review of the legislative history indicates that amending the repudiation provision, effectively overturning the Court's opinion in the *Bildisco* case, was of urgent and dire importance to Congress.[6] Congressman Peter W. Rodino, Jr., then Chairman of the House Committee on the Judiciary, stated, "this was the most serious matter that the conference had to deal with and we dealt with it over a long period of time and it was only after much deliberation and much exchange that we finally came to what we believe to be a very balanced provision which will provide for fair and equitable treatment. . . ." 130 *Cong.* Rec. H. 7489, June 29, 1984; *reprinted in* 1984 U.S.C.C.A.N. at 576, 577. He stated that the amendment was necessary to ensure that both covered employees, as well as creditors of the debtor, were fairly and equitably treated. *Id.*

Senator Dole, then a ranking member of the Senate Committee on the Judiciary, echoed Congress' intent to protect not only the debtor's creditors, but also the

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[5] The amendment is set out at 11 U.S.C. § 113 (1993).

[6] According to Senator Robert J. Dole, it was as a result of the *Bildisco* decision that "the house was spurred into action". 130 *Cong. Rec.* S. 8889, June 29, 1984; *reprinted in* 1984 U.S.C.C.A.N. at 586.

debtor's employees covered by the NLRA. According to Senator Dole the amendment would "require negotiations to attempt to save both the labor contract and the business. . . ." 130 *Cong. Rec.* S. 8889, June 29, 1984; *reprinted in* 1984 U.S.C.C.A.N. at 586-588. Senator Dole further stated that an amendment was necessary "to ensure that rejection is accomplished *only where the equities balance clearly in favor of rejection*" *Id.* (emphasis added). The legislative history consistently establishes the fact that Congress never intended to enact legislation providing for the unilateral and summary taking of the legally protected collective bargaining rights of employees.

Congress' conduct following the *Bildisco* decision evidences its intent to protect the constitutional and statutory right of employees to organize and collectively bargain. Legislative history makes it clear that Congress would never endorse a law that provided for the repudiation of a collective bargaining agreement absent any showing that the collective bargaining rights of covered employees were weighed and carefully considered prior to repudiation. Given evidence of Congress' clear intent, it is neither reasonable nor permissible to interpret 12 U.S.C. § 1787 as including collective bargaining agreements among those contracts subject to summary repudiation and the lower courts erred in so holding. (App. at pp. 9a, 30a).

III. H. ALLEN CARVER SHOULD NOT HAVE BEEN DISMISSED FROM THE ACTION.

Plaintiffs' Complaint alleges that Defendants' conduct violated the guarantees of freedom of association and due process to which they were entitled under the United States and Tennessee Constitutions. Specifically, the Complaint alleges that the act of repudiating the collective bargaining agreement, action indisputably taken by Defendant, H. Allen Carver, unlawfully infringed upon Plaintiffs' constitutional rights. Nevertheless, the District Court,

acting on a Magistrate's Report and Recommendations, dismissed Defendant, H. Allen Carver, on a Motion to Dismiss filed pursuant to Fed. R. Civ. P. 12(b)(6). (App. at p. 51a). This decision was upheld at the Court of Appeals level. (App. at p. 18a). As a result, Plaintiffs have been effectively foreclosed from pursuing their action for redress for injury resulting from constitutional violations.[7]

A Motion to Dismiss for failure to state a claim upon which relief can be granted is appropriate only when it is clear that the Plaintiff can provide no set of facts in support of his claim which would entitle him to relief. *Perkins v. Silverstein*, 939 F.2d 463 (7th Cir. 1991); *Lehy v. Board of Trustee Community College District No. 508*, 912 F.2d 917 (7th Cir. 1990); *Brooks v. Seiter*, 779 F.2d 1177 (6th Cir. 1985). The burden of demonstrating that the Plaintiff has failed to state a claim is upon the movant. Moreover, the Court must presume all factual allegations of the Complaint to be true and all reasonable inferences are to be made in favor of the non-moving party. *Miree v. DeKalb County Georgia*, 433 U.S. 25 (1977). In addition, in determining the propriety of a motion pursuant to Rule 12(b)(6), the allegations contained in the Complaint are to be liberally construed. *Duncan v. Leeds*, 742 F.2d 989 (6th Cir. 1984). In *Scheuer v. Rhodes*, 416 U.S. 232 (1974), this Court stated as follows:

> When a Federal Court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or by admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.

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[7] In the recently decided case of *FDIC v. Myer*, —— U.S. ——, 114 S. Ct. 996 (1994), the Court stated that no action may be maintained against a federal agency for a constitutional tort. *Myer, supra*, at ——, 114 S. Ct., at 1006.

> Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely, but that is not the test. Moreover, it is well-established that, in passing on a Motion to Dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the Complaint should be construed favorably to the pleader. *Scheuer v. Rhodes, supra*, at 236.

Since a dismissal of Rule 12(b)(6) is on the merits and is accorded *res judicata* effect, dismissal under (b)(6) is generally disfavored by the Courts and is appropriate only in extraordinary cases. *2A Moore's Federal Practice*, Section 1207(2)-(5) (1993).

On August 12, 1993, the District Court granted Defendant, H. Allen Carver's, Motion to Dismiss. (App. at p. 51a). At the time the Motion was granted, there was outstanding discovery in the nature of Requests for Production of Documents and Interrogatories, but no depositions had yet been taken. Nevertheless, the Court granted Defendant Carver's Motion to Dismiss based only on the facts alleged in Plaintiffs' Complaint in light of Defendants' qualified immunity defense.

Both at hearing on the Motion to Dismiss as well as in Plaintiffs' Third Amended Complaint, Plaintiffs alleged that Carver made and executed the decision to repudiate the collective bargaining agreement between the parties. Given firmly rooted federal protection, both constitutional and statutory, establishing the basic right of the employee to collectively bargain, Plaintiffs argue that Defendants failed to meet the standard and strict burden of proof applicable to a Rule 12(b)(6) Motion to Dismiss.

As is stated in the Magistrate's Report, it is well settled that a government official performing discretionary functions is shielded from liability for civil damages insofar as he acts within the scope of his authority and his conduct does not violate thoroughly established statutory or

constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). (App. at p. 60a). This Court in the *Harlow* decision goes on to state, however, that:

> Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and the person who suffers injury caused by such conduct may have a cause of action. *Harlow, supra*, at 819.

When an official has reason to know that an action might violate the statutory or constitutional rights of another, taking the action may subject that official to individual liability. *Harlow, supra*, at 819.

The Magistrate's Report that was adopted by the District Court concluded by stating:

> I do not find that an objective official in Carver's position would have reasonably believed that the actions he took as conservator of the Credit Union were in violation of any of the numerous rights Plaintiffs set out in their Complaint. (App. at p. 62a).

The Magistrate's Report continues by stating that:

> Given the express authority contained in the Federal Credit Union Act to repudiate contracts and given the lack of case law addressing the subject, no objectively reasonable official would have known he was violating Plaintiffs rights. (App. at p. 62a).

Admittedly there is little case law on the subject of the FCUA's repudiation of collective bargaining agreements, but there are volumes of case law attesting to the well-settled and clearly established constitutional and statutory mandates under federal labor law. Indeed, the Magistrate does not even make reference to the NLRA in his Report.

The right of an employee to negotiate terms and conditions of employment through a representative pursuant to a collective bargaining agreement provides for founda-

tion for modern day labor law. The Magistrate's Report, however, considers the FCUA in isolation. In light of clear constitutional and statutory guarantees, Carver should have (using the Court's language in the *Harlow* case) been "made to hesitate" before repudiating the collective bargaining agreement between the AGEFUC and Local 737.

Whether Carver hesitated or whether he summarily decided to repudiate the collective bargaining agreement with no regard for the statutory and constitutional rights of bargaining unit employees is unclear and should have been determined through discovery and ultimately at trial. The difficulty inherent in deciding a Motion to Dismiss at such an early stage in the proceedings is precisely the reason the Court has established such a stringent standard.

Given overwhelming federal authority which prohibits the summary repudiation of a collective bargaining agreement, it is clearly arguable, subject to critical findings of fact, that a reasonable official in Carver's position might understand that his actions violated the constitutional and statutory rights of Plaintiffs. In light of the strict standard that should have been applied to Defendants' Motion to Dismiss, the lower courts erred and the dismissal of Defendant, H. Allen Carver, should be overturned.

IV. THE INDIVIDUAL PLAINTIFFS HAD A PROPERTY INTEREST IN THEIR EMPLOYMENT CREATED BY THE COLLECTIVE BARGAINING AGREEMENT.

In addition to alleging that Defendant Carver's actions violated the constitutionally protected right to freedom of association, Plaintiffs alleged violations of their constitutional right of due process as well. The decisions of this Court support the proposition that government repudiation of a collective bargaining agreement without providing an opportunity for hearing constitutes a governmental

taking of a property interest in violation of the due process provisions of the United States Constitution.

In *Board of Regents v. Roth*, 408 U.S. 564 (1972), this Court stated as follows:

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. *Roth, supra*, at 577.

Using this Court's terminology, it is undisputed but that a collective bargaining agreement constitutes an independent source that defines existing rules and understandings between the parties and which secures benefits and supports claims of entitlement to benefits. At least one Appellate Court has readily acknowledged the fact that a collective bargaining agreement gives rise to a constitutionally protected property interest. In *Ratliff v. City of Milwaukee*, 795 F.2d 612 (7th Cir. 1986), the Court of Appeals for the 7th Circuit stated the following:

> [Plaintiff] Ratliff argues that the collective bargaining agreement, as construed by the arbitrator in her case, is an independent source of 'understanding' that creates a legitimate claim to and property interest in her job. A property interest in a job can be created by a collective bargaining agreement. *Ratliff, supra*, at 624, *citing Roth, supra*.

The District Court granted summary judgment in favor of the Defendants with regard to Plaintiffs' due process claims, holding that a collective bargaining agreement cannot create a property interest. (App. at p. 33a). The Court of Appeals for the Sixth Circuit disagrees with the District Court, correctly holding that a collective bargaining agreement may establish a property interest in continued employment, but nevertheless affirming the lower court's decision on the basis that, given specific provisions

in the collective bargaining agreement between Local 737 and AGEFCU, the individual Plaintiffs had no property interest in continued employment. (App. at p. 15a). In support of its conclusion, the Court of Appeals states that although the management's rights clause in the collective bargaining agreement states that employees can be fired for "just cause," there is no language indicating that employees may not be fired for no cause at all. (App. at p. 15a). Not only is the Court's interpretation clearly erroneous and contrary to established law, but it oversteps the bounds of the Court's authority by interpreting the terms of the collective bargaining agreement between the parties.

It is a matter of well-settled labor and arbitration law that management rights provisions providing for discharge of an employee for "just cause" indicates that an employee can *only* be fired for "just cause." Even where no "just cause" provision is contained in the collective bargaining agreement, a "just cause" standard is implied unless the agreement clearly provides to the contrary. *In re, University of Minnesota and Asbestos Workers Local 34*, 96 Lab. Arb. 957 (Arb. Charlotte Neigh, April 16, 1991); *In re, City of Evanston, Illinois and International Association of Firefighters Local 742*, 95 Lab. Arb. 679 (Arb. David A. Dilts, August 31, 1990); *In re, Binswanger Glass Company and Glazier Architectural Metal and Glassworkers Local 1778*, 92 Lab. Arb. 1153 (Arb. Samuel J. Nicholas, Jr., July 24, 1989); *In re, Sterling Chemical, Inc. and Texas City, Texas Metal Trades Council, AFL-CIO*, 93 Lab. Arb. 953 (Arb. F. Jay Taylor, October 10, 1989). The "just cause" standard is a universally recognized aspect of the collective bargaining relationship. The Court of Appeals' interpretation of the agreement as providing that an employee may be fired for no cause whatsoever is contrary to well-established law.

The recently published decision of the Sixth Circuit Court of Appeals not only injures the rights of individ-

ually-named Plaintiffs in this lawsuit, but threatens the rights of all union workers. Countless collective bargaining agreements contain "just cause" provisions identical to the one set out in the collective bargaining agreement between Local 737 and AGEFCU. Discharge only for just cause is diligently negotiated and is of central concern to every union member.

Furthermore, assuming arguendo that an issue of fact exists concerning the "just cause" standard and whether Appellants' due process rights were infringed upon, the Court of Appeals had no authority to interpret provisions of the collective bargaining agreement, but instead should have remanded the case to allow the appropriate interpreter of the agreement, an arbitrator, to determine what cause standard the agreement contains. Since 1960, this Court has consistently held that arbitration is the centerpiece of the collective bargaining relationship; the arbitrator is the "protector" of the parties' bargain. *Steel Workers v. American Manufacturing Company*, 363 U.S. 564 (1960); *Steelworkers v. Warrior and Gulf Navigation Company*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel and Car Corp.*, 564 U.S. 593 (1960). The Court of Appeals should not have attempted to interpret the collective bargaining agreement. Under well-established law, an arbitrator is the only authorized interpreter of a collective bargaining agreement. *Id.*

The decision of the Sixth Circuit puts at issue two of the most fundamental and time-honored tenants of collective bargaining: (1) A "just cause" provision ensures that an employee may only be discharged for just or proper cause; and (2) An arbitrator alone is the interpreter of the provisions of the collective bargaining agreement between the parties. The decision is contrary to the law in every other circuit as well as the holdings of this Court. Plaintiffs contend that, when the Credit Union entered into a collective bargaining agreement with the Union, bargaining unit employees secured certain

benefits such that they were vested with a property interest in their employment. Accordingly, government repudiation of the collective bargaining agreement, and the altering of wages, benefits, terms and conditions of employment that followed, must be measured against notions of due process.

CONCLUSION

Plaintiffs/Petitioners contend that the Court of Appeals erred in affirming the District Court's decision to grant summary judgment to Defendants with regard to the issue of whether the NCUAB lawfully repudiated the collective bargaining agreement between the parties. Although Congress intended the NCUAB to have substantial discretion and authority to rehabilitate failing credit unions, it did not intend for the federal government to summarily trample over the rights it has guaranteed employees under federal labor law without giving any consideration to those rights. In the present case, Plaintiffs found themselves not only without the benefit of the guarantees they had acquired through their collective bargaining, but, until the present suit was filed in District Court, without any forum whatsoever to hear their complaints. This Court's decision in the *Bildisco* case makes it clear that the interests of bargaining unit employees must at the very least be considered and weighed prior to rejection of a collective bargaining agreement.

In the *Bildisco* case, this Court addressed the standard necessary for the unilateral repudiation of a collective bargaining agreement. Assuming it had the authority to terminate the collective bargaining agreement at issue, the decision of the NCUAB was no less subject to that standard than it would have been had the standard been set out verbatim in the FCUA's repudiation provisions. The Defendants' conduct failed to meet the standard, nevertheless, the Court of Appeals affirmed an award of summary judgment in their favor. In doing so, the Court additionally upset fundamental and well-established

tenants of labor law. For all the foregoing reasons, Plaintiffs/Petitioners pray that the Court will grant their Petition for Certiorari.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 94-6349/6351

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 737; MARTHA POSTON; VIRGINIA LIGON; SUE DOSS; BRENDA MALEY; GLYNDA JOHNSON; TAMALA LAVENDER; LUCY PINSON; JANICE WEATHERLY; PHYLLIS LAW; DIANE ARMONAT; and MARY PEOPLES,
Defendants-Appellees.

v.

AUTO GLASS EMPLOYEES FEDERAL CREDIT UNION; NATIONAL CREDIT UNION ADMINISTRATION BOARD; and H. ALLEN CARVER,
Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Tennessee

Decided and Filed January 9, 1996

Before: LIVELY, NELSON, and SUHRHEINRICH, Circuit Judges.

LIVELY, Circuit Judge. This is an appeal by union members and their local union from summary judgment

for the defendants in an action arising out of a conservator's repudiation of a collective bargaining agreement. The employer is a federal credit union, subject to the terms of the Federal Credit Union Act (the Act), 12 U.S.C. § 1751 *et seq.* (1988). Section 207 of the Act, 12 U.S.C. § 1787(c)(1) (1988 ed. Supp. I), gives conservators specific authority to repudiate contracts:

> **(c) Provisions relating to contracts entered into before appointment of conservator or liquidating agent**
>
> **(1) Authority to repudiate contracts**
>
> In addition to any other rights a conservator or liquidating agent may have, the conservator or liquidating agent for any insured credit union may disaffirm or repudiate any contract or lease—
>
> (A) to which such credit union is a party;
>
> (B) the performance of which the conservator or liquidating agent, in the conservator's or liquidating agent's discretion, determines to be burdensome; and
>
> (C) the disaffirmance of repudiation of which the conservator or liquidating agent determines, in the conservator's or liquidating agent's discretion, will promote the orderly administration of the credit union's affairs.

This provision was added to the Act by section 1217(c) of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73 (1989).

There are three questions for decision by this court. First, whether the quoted provisions of the amended Act gave the conservator authority to repudiate a collective

bargaining agreement. Second, if the conservator had such authority, whether the conservator exercised it in this instance within the permissible bounds of labor-management relations law. Third, whether the individual who made the decision to repudiate the collective bargaining agreement in issue was entitled to qualified immunity from a claim for money damages.

I.

A.

The defendant Auto Glass Employees Federal Credit Union (the Credit Union) operates in Nashville, Tennessee. Prior to December 1991 it entered into a collective bargaining agreement with Local 737 of the United Automobile, Aerospace and Agricultural Implement Workers of America (Local 737 or the Union), which represented a majority of the Credit Union's non-management employees. The Credit Union experienced financial problems and on December 16, 1991, while the collective bargaining agreement remained in effect, the defendant National Credit Union Administration Board (the Board) appointed itself conservator of the Credit Union pursuant to a provision of the Act. See 12 U.S.C. § 1786(h). As conservator, the Board assumed control of all the Credit Union's operations, and named the defendant H. Allen Carver, its regional director, to oversee management of the Credit Union.

Following establishment of the conservatorship, the Board instituted various changes in work rules and policies that the Union claimed were violations of the existing collective bargaining agreement. On March 13, 1992, the Board submitted to union representatives proposed modifications to the collective bargaining agreement. The Union promptly rejected the proposal, and on March 20, the Board repudiated the collective bargaining agreement. Thereafter, the Board implemented new wage rates and employee benefits, terminated the existing employee

pension plan and distributed vested pension benefits to at least some of the plan beneficiaries.

B.

Local 737 and eleven present or former employees of the Credit Union who were members of Local 737 filed this action in district court seeking, insofar as this appeal is concerned, two remedies. First, they sought a declaration that the Board's action violated their federal constitutional and statutory rights. Second, the plaintiffs asked for compensatory and punitive damages, costs and attorney fees.

After the plaintiffs filed several amended complaints, their principal claim was that the Board's repudiation of the collective bargaining agreement violated provisions of the National Labor Relations Act (NLRA). They also alleged that the Board's actions caused termination, constructive discharge or permanent lay-off of employee-plaintiffs in violation of their constitutional right to not be deprived of a property interest without due process of law. Two of the original defendants filed a motion to dismiss under FED. R. CIV. P. 12(b)(6). This motion was referred to a magistrate judge who recommended granting dismissal to an improperly named defendant and to the defendant Carver. The plaintiffs only objected to the recommendation to dismiss Carver. Overruling the objection, the district court dismissed Carver as a defendant upon finding that the magistrate judge correctly determined that Carver had been sued in his individual capacity and was entitled to qualified immunity. The remaining defendants filed a motion for partial summary judgment, and the plaintiffs responded with a motion for partial summary judgment of their own.

In ruling on the cross-motions, the district court decided the principal issue that is the subject of this appeal. By later stipulation, the plaintiffs dismissed their remaining claims and the district court entered a final judgment.

II.

The district court held that the language of the Act granting authority to conservators of federal credit unions to repudiate contracts is broad enough to include collective bargaining agreements. *International Union v. Auto Glass Employees Federal Credit Union*, 858 F. Supp. 711, 718 (M.D. Tenn. 1994). The court pointed out that collective bargaining agreements are not excepted from the language authorizing repudiation and found no reason to exclude such contracts by implication. *Id.*

The district court discussed *N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513 (1984), in which the Supreme Court held that a provision of the Bankruptcy Code (11 U.S.C. § 365(a)) authorizing trustees to repudiate "executory contracts," permitted a debtor-in-possession to repudiate a collective bargaining agreement "upon an appropriate showing." *Id.* at 516. Congress overruled *Bildisco* in a 1984 amendment that prohibits the unilateral repudiation of collective bargaining agreements by a trustee or a bankrupt debtor-in-possession absent compliance with explicit conditions. See Pub. L. No. 98-353, § 541(a) (codified as amended at 11 U.S.C. § 1113 (1988)). The district court found that this congressional action recognized the importance of collective bargaining agreements, but that it was not decisive of the issue in the present case. The district court noted that when Congress granted contract repudiation authority to conservators of federal credit unions in 1989, it neither excluded nor provided conditions applicable only to collective bargaining agreements. *Auto Glass*, 858 F. Supp. at 719. The district court apparently felt that, having examined the right of repudiation only five years earlier in considering *Bildisco*, Congress was aware that, absent specific language excluding collective bargaining agreements, a broad authorization to repudiate contracts would be construed to include such agreements. See *id.* at 719. The district court also concluded that the stricter standard for

repudiation in bankruptcy proceedings was inapplicable to repudiation under the Act. *Id.* at 719-20.

Further, the district court held that under the terms of the collective bargaining agreement, the employees had no property right in continued employment that was entitled to due process protection. *Id.* at 720-21.

III.

A.

On appeal the plaintiffs assert that the Credit Union and the Board began violating the collective bargaining agreement shortly after the conservator assumed control by dealing directly with employees who were union members and unilaterally changing some of the conditions of employment. They also insist that the defendants did not offer to negotiate new terms. Instead, the Board presented to the Union a proposed list of changes and indicated that unless the Union agreed to the changes, the conservator would repudiate the collective bargaining agreement.

The defendants' actions, the plaintiffs say, violated sections 7 and 8 of the NLRA, 29 U.S.C. §§ 157, 158 (1988). Section 7 guarantees employees the right to organize and bargain collectively, and section 8 prohibits as an unfair labor practice any action by an employer that interferes with rights guaranteed by section 7. A refusal to negotiate with a union over proposed changes in a collective bargaining agreement is an unfair labor practice. See 29 U.S.C. § 158(d).

Finally, the plaintiffs argue that Carver unlawfully deprived the individual employees of their rights under the NLRA and the Fifth Amendment by ordering the repudiation of the collective bargaining agreement. Because in the plaintiffs' view these rights were clearly established under the NLRA, Carver was not entitled to qualified immunity.

B.

The defendants respond that they acted within their clear authority under the Act. Before entering the order of conservatorship, according to the defendants, they determined this step was necessary in order to conserve the assets of the Credit Union and to protect the interests of its members. The Credit Union was in a precarious financial condition, and one of the causes of this condition was its higher-than-normal operating costs, the largest of which was for employee compensation. When the Board attempted to rehabilitate the Credit Union by making changes in work conditions the Union took the position that the changes violated the collective bargaining agreement. Then, when the Board proposed changes in the collective bargaining agreement that would effect economies, the Union rejected these proposals. The defendants aver that this sequence of events leading up to the repudiation order is uncontradicted. Thus, they say, the conditions found by the conservator permitted repudiation, and the Union did not attempt to negotiate. Instead, it flatly rejected the Board's proposals.

The Board makes a "plain meaning" argument in response to the plaintiffs' contention that the Act does not authorize the repudiation of collective bargaining agreements. Section 1787(c)(1) authorizes a conservator to repudiate "any contract" upon making certain determinations. These determinations—that a contract is "burdensome" and its repudiation "will promote the orderly administration of the credit union's affairs"—are to be made in the conservator's discretion. 12 U.S.C. § 1787(c)(1)(B)(C). Thus, according to the defendants, the language of the statute does not permit a construction that exempts collective bargaining agreements from the reach of a conservator's authority to repudiate contracts.

The defendants also argue that there is no basis for implying the existence of such an exemption. Congress

enacted FIRREA more than 50 years after enacting the NLRA. The defendants maintain that Congress did not overlook the centrality of collective bargaining in labor relations, but instead determined that in certain situations rights of employees created by the NLRA would have to give way to rights of investors and other members of a credit union.

In addition, Carver contends that his dismissal on qualified immunity grounds cannot be overturned. He says that the plaintiffs did not carry their burden to plead and prove the existence of a clearly established constitutional or statutory right that Carver allegedly violated. He argues that the district court properly applied the "reasonable official" test and determined that Carver could not be found individually liable to the plaintiffs in damages for repudiating the collective bargaining agreement.

IV.

This appears to be a case of first impression with respect to whether 29 U.S.C. § 1787(c)(1) grants a conservator of a federal credit union authority to repudiate a collective bargaining agreement between the credit union and its employees' certified union. We review a district court's construction of a statute de novo. *United States v. Brown*, 915 F.2d 219, 223 (6th Cir. 1990) (citations omitted). We review an order granting summary judgment under the same standard. *Brooks v. American Broadcasting Cos.*, 932 F.2d 495, 500 (6th Cir. 1991) (citation omitted).

A.

We agree with the defendants and the district court on the primary question. The language of 12 U.S.C. § 1787(c)(1) unequivocally grants authority to conservators to repudiate "any contract" if the conservator determines that the statutory conditions have been met. This authority is to be exercised in the conservator's dis-

cretion. If the plain language of a statute is unambiguous, the express terms used by the legislature are conclusive. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (citation omitted); *Baum v. Madigan*, 979 F.2d 438, 442 (6th Cir. 1992) (citation omitted). Our conclusion that "any contract" includes collective bargaining agreements is buttressed by the fact that the Act contains provisions qualifying the Board's repudiation authority over some specific types of contracts, but there is no such provision with regard to collective bargaining agreements. See 12 U.S.C. § 1787(c)(4)-(8), (11). Nor is the term "contract," as used in 12 U.S.C. § 1787(c)(1), specifically defined anywhere in the Act. Since collective bargaining agreements are clearly "contracts," the plain language of the Act authorizes the Board as conservator to repudiate collective bargaining agreements.

We do not disagree with the plaintiffs' statement that collective bargaining agreements are central to labor-management relations and differ in some respects from ordinary commercial contracts. See *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 550 (1964). We believe, however, that Congress' inclusion of the repudiation authorization for conservators in the Act without an exception for collective bargaining agreements demonstrates a congressional intent to give "any contract" its ordinary meaning.

It is a settled principle of statutory construction that when Congress drafts a statute, courts presume that it does so with full knowledge of the existing law. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) (citing *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979)). Accordingly, "[w]hen two statutes conflict the general rule is that the statute last in time prevails as the most recent expression of the legislature's will." *Boudette v. Barnette*, 923 F.2d 754, 757 (9th Cir. 1991) (citation omitted). The fact that Congress revised

the Bankruptcy Code in 1984 to exempt collective bargaining agreements from a contract repudiation provision similar to the provision at issue here simply indicates to us that Congress knew how to draft such an exemption. See Pub. L. No. 98-353, § 541(a). Had Congress intended to afford similar protection to collective bargaining agreements in the context of the Act, it would have explicitly done so when it enacted the contract repudiation provision as part of FIRREA.

FIRREA was enacted to respond to a national emergency threatening many federally-insured and federally-created financial institutions. H.R. Rep. No. 101-54(I), 101st Cong. 1st Sess. 291-308, *reprinted in* 1989 U.S.C.C.A.N. 87-104. The crisis environment in which the repudiation authority was granted is demonstrated by the additional provisions of the amendment directing the Board as conservator to make a decision concerning repudiation "within a reasonable period" following its appointment, 12 U.S.C. § 1787(c)(2), and empowering conservators to "take *any* action authorized by [the Act], which the Board determines is in the best interests of the credit union, its account holders, or the Board." 12 U.S.C. § 1787(b)(2)(G) (emphasis added). It was within Congress' legislative authority to determine, in light of the emergency it addressed in enacting FIRREA, that rights it had created in earlier legislation should be subordinated to other rights threatened by that emergency.

B.

We consider next the plaintiffs' alternative argument that even if the Act does authorize the repudiation of a collective bargaining agreement, the Supreme Court's decision in *Bildisco* mandates some consideration of how the rights guaranteed to employees under the NLRA will be affected before a collective bargaining agreement may be unilaterally repudiated. In *Bildisco*, the Court held that while the Bankruptcy Code gave a bankruptcy trustee

repudiation authority over a collective bargaining agreement, such an agreement could be repudiated only if a bankruptcy court found the following: (1) that the debtor demonstrated that the collective bargaining agreement burdens the estate; (2) that the equities balance in favor of rejecting the labor contract; (3) that reasonable efforts to negotiate a voluntary modification had been made without success; and (4) that bankruptcy policy would be served by the rejection. *Bildisco*, 465 U.S. at 526-27. Thus, the question presented by the plaintiffs is whether the *Bildisco* decision imposes a heightened standard of consideration for the repudiation of a collective bargaining agreement in the context of conservatorship under the Act.

The district court found that *Bildisco*'s repudiation standard was inapplicable to the repudiation in the instant case because of differences between the Bankruptcy Code and the Act. The court noted that unlike § 365 (a) of the Bankruptcy Code, 12 U.S.C. § 1787(c) requires no court approval prior to the repudiation of a contract by a conservator. *Auto Glass*, 858 F. Supp. at 719-20; see 12 U.S.C. § 1787(c)(1)(B), (C). Further, the court found it significant that § 365(a) of the Bankruptcy Code lacked a standard for repudiation, whereas the Act explicitly provides such a standard. *Auto Glass*, 858 F. Supp. at 720; see 12 U.S.C. § 1787(c)(1)(B), (C).

We agree that the *Bildisco* Court set out specific standards for the repudiation of collective bargaining agreements because it was faced with a statute that provided no guidance as to the circumstances under which a contract could be repudiated. See 11 U.S.C. § 365(a). Here, however, we are presented with a situation in which Congress has explicitly chosen to vest sole discretion to repudiate a "burdensome" contract in the hands of a credit union's conservator or liquidating agent when the conservator or liquidating agent determines that repudia-

tion would "promote the orderly administration of the credit union's affairs." 12 U.S.C. § 1787(c)(1)(B), (C). When Congress enacted 12 U.S.C. § 1787(c), it was certainly aware of *Bildisco* as well as the special statutory procedure for the repudiation of a collective bargaining agreement under 11 U.S.C. § 1113, but apparently found no need to incorporate similar protections for labor contracts into the Act. As the defendants point out, § 1787(c) simply reflects a legislative judgment "that the conservator of a failing credit union should be given broader powers than a trustee or debtor-in-possession of a private enterprise."

Moreover, the purpose of the Act, enacted in 1934, was to provide a workable system of credit for people of "small means" in order to spur economic recovery. *Branch Bank & Trust Co. v. National Credit Union Admin. Bd.*, 786 F.2d 621, 625-26 (4th Cir. 1986) (citing S. Rep. No. 583 73d Cong., 2d Sess. 1 (1934)), *cert. denied*, 479 U.S. 1063 (1987). The repudiation powers given to a conservator under § 1787(c) are consistent with this underlying purpose of the Act, given the precarious condition of many financial institutions that provided credit for people of "small means" (e.g., thrift associations and credit unions) at the time of FIRREA's enactment. Thus, the district court correctly concluded that the *Bildisco* standard for repudiation should not be imported into the Act. See *Crandon v. United States*, 494 U.S. 152, 168 (1990) (where Congress uses language in a particular section of an act that is in "harmony with what is thought to be the spirit and purpose of the act," there is no reason to depart from the statutory language).

We are troubled by the Board's unilateral repudiation of all terms and conditions of the agreement based solely on its determination that the credit union's "compensation expense" was unduly burdensome. Although no court has addressed the issue of whether there was an adequate showing of "burden" before the repudiation of

a contract under the Act, it is useful to examine the issue under the repudiation provision of the Federal Deposit Insurance Act (FDIA), 12 U.S.C. § 1821(e) (1988 ed. Supp. I), enacted at the same time as 12 U.S.C. § 1787 (c) as par of FIRREA and which closely tracks its language. See Pub. L. No. 101-73, § 212(e) (codified as amended at 12 U.S.C. § 1821(e)).

Under the FDIA, courts have uniformly held that a conservator or receiver has complete discretion in making the decision to repudiate and need not make any formal findings as to whether a contract is "burdensome" or a repudiation is "necessary to promote orderly administration." *1185 Ave. of the Americas Assocs. v. Resolution Trust Corp.*, 22 F.3d 494, 498 (2d Cir. 1994); *Hennessy v. F.D.I.C.*, 58 F.3d 908, 920 (3d Cir. 1995); *Monrad v. F.D.I.C.*, 62 F.3d 1169, 1172 (9th Cir. 1995); see also *Howell v. F.D.I.C.*, 986 F.2d 569, 572 (1st Cir. 1993) ("[a] litigant would normally have an uphill battle in overturning an FDIC finding of 'burden' . . . ."). Because nothing in § 1787(c) requires specific findings to support repudiation, and given the expansive language granting repudiation authority to conservators, we find that the Board as conservator acted within its authority in repudiating a collective bargaining agreement it found burdensome.

V.

The plaintiffs also sought a declaration that the Board's action in repudiating the collective bargaining agreement violated their constitutional right to due process. The district court held that a private contract cannot create a property interest entitled to due process protection. *Auto Glass*, 858 F. Supp. at 720. Although we agree with the district court's conclusion that the Board's action in terminating the collective bargaining agreement did not infringe the plaintiffs' due process rights, we reach this conclusion on the basis of different reasoning.

The Supreme Court has recognized that property interests protected by the Fifth Amendment may be created by virtue of purely private contractual agreements. *Greene v. McElroy*, 360 U.S. 474, 492, 493 n.22 (1959); *Brock v. Roadway Express*, 481 U.S. 252, 260-61 (1987); *F.D.I.C. v. Mallen*, 486 U.S. 230, 240 (1988). In *Roadway Express*, a plurality of the Supreme Court accepted the premise that a private employer's right to discharge an employee for cause, pursuant to a collective bargaining agreement, was a property interest protected by the Fifth Amendment. *Roadway Express*, 481 U.S. at 260-61 n.2. There, a discharged employee of a trucking company was reinstated after the Secretary of Labor found reasonable cause to believe that he was the victim of a retaliatory discharge. *Id.* at 255-56. Given the employer's contractual right to discharge its employees for cause, the Court determined that the employer had been deprived of its "property" without due process because it had not been informed of the substance of the evidence supporting the employee's allegations. *Id.* at 260-65.

This court reached the same conclusion in *Mertik v. Blalock*, 983 F.2d 1353, 1360 (1993), where we stated: "*Roadway Express* makes clear that a private contractual right can constitute a property interest entitled to due process protection from governmental interference under federal constitutional law." Here a government official, Carver, interfered with a private contractual relationship by making the decision to repudiate the collective bargaining agreement on behalf of a government agency, the Board. Thus, we must determine whether the collective bargaining agreement in the present case created a property interest in continuing employment.

The plaintiffs must demonstrate a "legitimate claim of entitlement" to continued employment based on the collective bargaining agreement in order to prevail. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Here, the plaintiffs have pointed to nothing in the collective

bargaining agreement at issue which gave assurances of continued employment at the Credit Union, and they do not claim that any other "rules or understandings" gave them a reasonable expectation that their termination would only be for good cause. Cf. *Chilingirian v. Boris*, 882 F.2d 200, 203 (6th Cir. 1989) (at-will public employees have no property interest in continued employment). The agreement merely contained provisions that gave employees the right to have their complaints heard in a grievance procedure and the right to discuss their discharge with the Union and management prior to leaving the worksite. Although the non-exhaustive list of management rights in the collective bargaining agreement included the right to discharge employees for "just cause," no provision explicitly promised that the Credit Union would not discharge its employees without cause. Compare *Johnston-Taylor v. Gannon*, 907 F.2d 1577, 1581 (6th Cir. 1990) and *Moffitt v. Town of Brookfield*, 950 F.2d 880, 885 (2d Cir. 1991) (finding that collective bargaining agreements which explicitly guaranteed continuing employment gave rise to property interests).

We further note that under Tennessee law, employees hired for an indefinite term can be terminated with or without cause absent an express or implied contract altering their status as at-will employees. See *Gregory v. Hunt*, 24 F.3d 781, 785-86 (6th Cir. 1994), *cert. denied*, 116 S.Ct. 215 (1995); *Bennett v. Steiner-Liff Iron and Metal Co.*, 826 S.W.2d 119, 121 (Tenn. 1992); *Graves v. Anchor Wire Corp. of Tennessee*, 692 S.W.2d 420, 421-22 (Tenn. App. 1985). Because we find that the plaintiffs did not have a property interest in continued employment, the Due Process Clause of the Fifth Amendment was not implicated in their termination. This being so, the plaintiffs failed to demonstrate the existence of a clearly established constitutional right that Carver violated by repudiating the collective bargaining agreement

without notice to the plaintiffs and an apportunity to be heard.

VI.

We now consider the claims against the defendant Carver. Accepting the magistrate judge's recommendation, the district court granted Carver qualified immunity and dismissed all claims against him. Because we agree with the district court's conclusion that Carver was entitled to qualified immunity, we affirm the dismissal. We review the district court's decision de novo. *Vaughn v. United States Small Business Admin.*, 65 F.3d 1322, 1325 (6th Cir. 1995).

Government officials performing discretionary functions "generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Once a government official raises the defense of qualified immunity, the plaintiffs must plead and prove with some particularity the existence of a clearly established right that the official is alleged to have violated. *Dominque v. Telb*, 831 F.2d 673, 676 (6th Cir. 1987). Whether immunity attaches depends upon the "objective reasonableness of an official's conduct, as measured by reference to clearly established law . . . ." *Harlow*, 457 U.S. at 818. The official is entitled to dismissal before discovery is completed if the facts as alleged do not support a claim of violation of clearly established law. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). To determine whether a right has been clearly established, we look to "the federal constitutional, statutory, and case law existing at the time of the challenged action." *Rodgers v. Jabe*, 43 F.3d 1082, 1085 (6th Cir. 1995) (citation omitted).

The plaintiffs' pleadings and proof do not clearly identify the basis of their claim against Carver, but they relied on two arguments in the district court. First, they contended that the repudiation by Carver without prior ne-

gotiations violated their clearly established collective bargaining rights under NLRA. As we pointed out in Part IV A, however, Congress authorized conservators of federal credit unions to repudiate "any contract." Since we concluded that this authority covered collective bargaining agreements, Carver acted within statutory authority when he repudiated the agreement in this case.

The plaintiffs have cited no case holding that the unilateral repudiation of a collective bargaining agreement pursuant to authority granted by Congress violates a right established by the NLRA, and we have found none. As we concluded in Part IV A, in the case of federal credit unions and other federally-funded and insured institutions covered by FIRREA, Congress determined that the economic emergency addressed in that statute required the subordination of some employee rights to the larger purpose of securing the resources and investments of credit unions and their members. The plaintiffs totally failed to demonstrate the existence of any clearly established federal statutory right that Carver violated.

The plaintiffs' second contention, that Carver violated their constitutional right to due process is not clearly articulated. As we construe their argument, it is that the collective bargaining agreement created a "property interest" that could not be taken away without some sort of notice and hearing. The claimed property interest is not identified. We assume the property interest consists of a right not to be terminated from their employment. As we demonstrated in Part V, however, they had no such property right. Again, we find that the plaintiffs failed to identify the clearly established constitutional right which they claim Carver violated.

We conclude that the plaintiffs failed to carry their burden to plead or prove the clearly established right they claim Carver violated by repudiating the collective bargaining agreement. Thus, under *Dominque v. Telb*, the

district court properly accepted the magistrate judge's recommendation and dismissed Carver as a defendant. See also *Veney v. Hogan*, No. 94-3757, —— F.3d ——, 1995 WL 710915 (6th Cir. Dec. 5, 1995) (dismissal proper if plaintiff fails to carry pleading burden either in the original complaint or in response to defendant's assertion of qualified immunity defense).

The judgment of the district court dismissing all claims is AFFIRMED.

APPENDIX B

[Entered 6/22/94]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3-92-0821
Judge Higgins

INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *et al.*

v.

AUTO GLASS EMPLOYEES FEDERAL CREDIT UNION, *et al.*

MEMORANDUM

The Court has before it cross motions for partial summary judgment on behalf of the defendants,[1] Auto Glass Employees Federal Credit Union (AGEFCU) and the National Credit Union Administration Board (the Board) (filed August 17, 1993; Docket Entry No. 46),[2] and the

[1] In their motion, the defendants also seek to strike portions of the plaintiffs' jury demand.

[2] Jerry Sweet, individually and in his official capacity as agent of the NCUA, was added as a defendant in the plaintiffs' first amended complaint (filed October 16, 1992; Docket Entry No. 6). Mr. Sweet was an agent of the NCUA who was appointed president and plan administrator of the AGEFCU after the NCUA took over as conservator of the credit union. *See id.* ¶ 6. The plaintiffs' cause of action against Mr. Sweet, both individually and in his official capacity, was subsequently dismissed with prejudice. Order (entered February 16, 1994; Docket Entry No. 82).

plaintiffs, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 737 (the Union), Martha Poston, Virginia Ligon, Sue Doss, Brenda Maley, Glynda Johnson, Tamala Lavender, Lucy Pinson, Janice Weatherly, Phyllis Law, Diane Armonat, and Mary Peoples (filed September 9 and 20, 1993; Docket Entry Nos. 56 and 65)[3] for partial summary judgment. The Court also has before it the defendants' memorandum (filed August 17, 1993; Docket Entry No. 47) in support; the plaintiffs' memorandum (filed September 9 and 20, 1993; Docket Entry Nos. 57 and 66) and their supplemental memorandum (filed January 5, 1994; Docket Entry No. 77) in support.

The Court has subject matter jurisdiction over the plaintiffs' claims pursuant to 28 U.S.C. § 1331.

For the reasons discussed below, the Court shall grant the defendants' motion for partial summary judgment in part and deny it in part. In addition, the Court shall grant the plaintiffs' partial summary judgment motion in part and deny it in part.

I.

This cause of action arises out of the repudiation of a collective bargaining agreement, pursuant to the Federal Credit Union Act (FCUA), 12 U.S.C. §§ 1751-1786, by the conservator of a federal credit union. The plaintiffs, the Union and numerous individuals who are or were employees of defendant AGEFCU, originally filed their action against AGEFCU and its conservator, the National Credit Union Administration (NCUA), alleging

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[3] The plaintiffs erroneously cited one of the relevant federal statutes as the "National Credit Union Act" in their first motion (Docket Entry No. 56) and accompanying memorandum (Docket Entry No. 57). They subsequently corrected the reference to the federal statute as the "Federal Credit Union Act" in their second motion (Docket Entry No. 65) and accompanying memorandum (Docket Entry No. 66).

numerous statutory and constitutional violations.[4] Complaint (filed September 14, 1992; Docket Entry No. 1). The plaintiffs filed their amended complaint (Docket Entry No. 6) on October 16, 1992, thereby adding Jerry Sweet, individually and in his official capacity as agent of the NCUA, as a defendant as well as posing a jury demand.[5] The plaintiffs subsequently moved (motion filed February 16, 1993; Docket Entry No. 16) to join H. Allen Carver[6] and the Board as defendants, which was granted by the Court. *See* order (Docket Entry No. 19) entered February 23, 1993. The plaintiffs' second amended complaint (Docket Entry No. 22), which added the Board and Mr. Carver individually and in his official capacity as agent of the NCUA as defendants, was filed on March 9, 1993.

On March 30, 1993, defendants NCUA and Mr. Carver in his individual capacity filed a motion (Docket Entry No. 27) to dismiss the plaintiffs' action pursuant to Fed. R. Civ. P. 12(b)(6). The Court referred this motion to the Magistrate Judge for consideration, submission of proposed findings of fact and recommendation for disposition, *see* order (Docket Entry No. 32) entered April 26, 1993, pursuant to 28 U.S.C. § 636(b)(1)(B). The Magistrate Judge recommended that the motion to dismiss be granted with respect to defendants NCUA and Carver. Report and Recommendation (entered July 7, 1993; Docket Entry No. 38). The Court approved and

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[4] The complaint alleged violations of the First and Fourteenth Amendments of the Constitution, Article 1, Section 23 of the Tennessee Constitution, the Federal Credit Union Act, Labor Management Relations Act and the Employee Retirement Income Security Act. The amended complaint also alleged violation of the Fifth Amendment of the Constitution. *See* amended complaint (Docket Entry No. 6).

[5] The plaintiffs' cause of action against defendant Sweet was dismissed with prejudice by agreed order entered February 16, 1994 (Docket Entry No. 82).

[6] Mr. Carver was regional director and agent of the NCUA.

adopted the Report and Recommendation in its entirety, *see* order (Docket Entry No. 43) entered August 12, 1993, thereby dismissing the plaintiffs' action as to defendants NCUA and Mr. Carver in his individual capacity.

The plaintiffs' motion (filed May 24, 1993; Docket Entry No. 34) to file a third amended complaint was granted by the Court (Docket Entry No. 45) on August 12, 1993. The amendments to the complaint, *see* third amended complaint (filed August 20, 1993; Docket Entry No. 51), added claims on behalf of certain plaintiffs under Title VII and the Age Discrimination in Employment Act (ADEA).[7]

The facts giving rise to this action began on December 16, 1991, when the Board issued an order of conservatorship, pursuant to 12 U.S.C. § 1786(h), thereby appointing itself conservator for the AGEFCU. On January 3, 1992, the Board assumed all authority for the credit union's operations in its capacity as the AGEFCU's conservator. Mr. Sweet, who was appointed by the Board as president of AGEFCU and administrator of its pension benefit plan, took a number of employment actions[8] which the Union considered to be violative of the collective bargaining agreement in effect between AGEFCU employees and the Union. A meeting of the Board's agents and union representatives was held on March 13, 1992, during which the Board proposed changes to the collective bargaining agreement which were deemed neces-

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[7] In granting the plaintiffs' motion to file the third amended complaint, the Court precluded any allegations against defendant Carver in his individual capacity, since the action against him in his individual capacity was dismissed by the entry of a separate order. *See* order (Docket Entry No. 45) entered August 12, 1993.

[8] As examples, the plaintiffs cite changes in the employee dress code, conversion of the offices to a smoke-free environment, changes in employee insurance benefits and premiums, and abolition of the collective bargaining agreement's grievance procedure. *See* plaintiffs' memorandum (Docket Entry No. 66) at 2.

sary for rehabilitation. The Union did not accept the proposed changes and the Board provided the Union with written notice of its repudiation of the collective bargaining agreement on March 20, 1992. Implementation of the employees' new wages and benefits occurred on April 1, 1992, and following terminaiton of the AGEFCU Money Purchase Plan and Trust on April 21, 1992, vested benefits were paid to the plan participants.[9]

In their summary judgment motion, the plaintiffs contend that the defendants' conduct in unilaterally changing their employment conditions and in repudiating the collective bargaining agreement violated the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.*, and the Federal Credit Union Act (FCUA). 12 U.S.C. §§ 1751-1786. They state that the Board had no authority to repudiate their collective bargaining agreement because it is not an executory contract under the FCUA. Memorandum (Docket Entry No. 66) at 4-9. In addition, the plaintiffs contend that the defendants violated their constitutional rights by depriving them of property without due process. *Id.* at 12-14. The plaintiffs further assert that the Union is a proper party to file this action pursuant to the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.*, *id.* at 15-16, and that the AGEFCU is a proper ERISA defendant in light of its control over the administration of the pension plan. *Id.* at 16-17.

In contrast, the defendants contend that the FCUA supersedes any alleged violations of the NLRA or the LMRA and that its repudiation of contracts provision encompasses collective bargaining agreements. Memorandum (Docket Entry No. 47) at 5-9. In addition, the defendants assert that the Union lacks standing to assert

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[9] The plaintiffs contend that pension benefits of some employees have been withheld. They also allege that as a result of the repudiation, several employees received reduced wages, while others were either terminated, constructively discharged, or permanently laid off.

an ERISA claim, *id.* at 9-10, and that AGEFCU is not a proper party defendant to the plaintiffs' ERISA claims. *Id.* at 10. Finally, the defendants claim that the state law claim of wrongful termination is pre-empted by ERISA, *id.* at 11-12, and that the plaintiffs have failed to state a cause of action for intentional interference with a contract under Tenn. Code Ann. § 47-50-109. *Id.* at 13.

II.

As provided by Federal Rule of Civil Procedure 56(c), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 2509-10, 91 L.Ed.2d 202, 211 (1986). In order to prevail on a summary judgment motion, the moving party bears the burden of proving the absence of a genuine issue of material fact concerning an essential element of the opposing party's action. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265, 274 (1986); *Davidson & Jones Dev. Co. v. Elmore Dev. Co.*, 921 F.2d 1343, 1349 (6th Cir. 1991); *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989).

In this action, both parties submit that the questions posed by their respective partial summary judgment motions are not subject to any genuine issue of material fact, thereby rendering them appropriate for the Court's determination as a matter of law. *See* defendants' memomandum (Docket Entry No. 47) at 3-4; plaintiff's (Docket Entry No. 66) at 3-4. Because of the absence of a genuine issue of material fact, a jury or judge, as fact finder, is not necessary to resolve the parties' differing versions of the truth. *Liberty Lobby*, 477 U.S. at 249, 106 S.Ct. at 2510, 91 L.Ed.2d at 212; *First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S.

253, 289, 88 S.Ct. 1575, 1592, 20 L.Ed.2d 569, 592 (1968). Rather, resolution of the parties' partial summary judgment motions in such a situation will depend upon the Court's determination of the questions of law presented.

III.

At issue in the plaintiff's claims concerning the defendants' repudiation of the collective bargaining agreement is the interplay of several federal statutes, namely, the FCUA, 12 U.S.C. §§ 1751-1795i, the LMRA, 29 U.S.C. § 141 *et seq.*, and the NLRA, 29 U.S.C. § 151 *et seq.* While the defendants contend that the authority vested in the Board, as conservator, by the FCUA to repudiate executory contracts supersedes any alleged violations of the LMRA or NLRA, the plaintiffs assert that collective bargaining agreements are not ordinary contracts and are therefore not encompassed by the FCUA's repudiation provision. They contend that because the plaintiffs' collective bargaining agreement is not subject to repudiation, the defendants' actions violated the NLRA and deprived them of property without due process.

In considering the issue of whether the FCUA's repudiation provision includes collective bargaining agreements, the Court must first examine the relevant statute. As noted by the United States Supreme Court, in determining the scope of a statute, the Court looks first to the statutory language and attributes ordinary meaning to the words used. *Moskal v. United States*, 498 U.S. 103, 108, 111 S.Ct. 461, 465, 112 L.Ed.2d 449, 458 (1990). Statutory construction requires the court's examination of the plain language of the statute in order to determine its meaning. *United States v. Ron Pair Enters.*, 489 U.S. 235, 241, 109 S.Ct. 1026, 1030, 103 L.Ed.2d 290, 298 (1989); *Grand ex rel. United States v. Northrop Corp.*, 881 F. Supp. 333, 335 (S.D. Ohio 1992). In instances where the statutory language is clear, the court's duty is to enforce the law according to its terms. *Ron Pair Enters.*, 489 U.S. at 241, 109 S.Ct. at 1030, 103 L.Ed.2d

at 298. In addition to the particular statutory language used, the statute's design and its object and policy are also important variables in statutory construction. *Crandon v. United States*, 494 U.S. 152, 158, 110 S.Ct. 997, 1001, 108 L.Ed.2d 132, 140 (1990); *United States v. Honaker*, 5 F.3d 160, 161 (6th Cir. 1993), *cert. denied*, —— U.S. ——, 114 S.Ct. 1226, 127 L.Ed.2d 571 (1994).

In the event that two federal statutes conflict, courts generally assume that Congress is aware of existing law when it enacts new legislation, *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32, 111 S.Ct. 325, 112 L.Ed.2d 275, 291 (1990), and as a result, "the statute last in time prevails as the most recent expression of the legislature's will." *Boudette v. Barnette*, 923 F.2d 754, 757 (9th Cir. 1991). As noted by one court, "[i]t is presumed that when Congress drafts a statute, it does so with full knowledge of the existing law and with great care for the precise language which must be used to achieve the desired result." *Federal Elec. Corp. v. Dunlap*, 419 F. Supp. 221, 225 (M.D. Fla. 1976).

A. *Federal Credit Union Act*

Congress enacted the FCUA in order to establish a system of credit unions to facilitate stabilization of the nation's credit structure and to achieve increased availability of loans. *Branch Bank & Trust Co. v. National Credit Union Admin. Bd.*, 786 F.2d 621, 625-26 (4th Cir.), *cert. denied*, 479 U.S. 1063, 107 S.Ct. 948, 93 L.Ed.2d 997 (1986); *National Temple Non-Profit Corp. v. National Temple Community Federal Credit Union*, 603 F. Supp. 807, 809 (D.C. Pa. 1985). The FCUA created the NCUA, which is an independent executive branch agency managed by the Board. 12 U.S.C. § 1752a(a), (d). The NCUA investigates applications from credit unions seeking a federal charter and grants such a charter in appropriate cases.[10]

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[10] The NCUA may grant such a charter if it finds that the group possesses an appropriate occupational, associational, community or

A federal credit union is statutorily defined as "a cooperative association organized in accordance with the provisions of this chapter for the purpose of promoting thrift among its members and creating a source of credit for provident or productive purposes." 12 U.S.C. § 1752 (1). Each federal credit union remains under the Board's supervision and, as such, is subject to examination by the Board and required to submit annual financial reports. 12 U.S.C. § 1756.

The FCUA specifically provides as follows:

> (1) The Board may, *ex parte* without notice, appoint itself as conservator and immediately take possession and control of the business and assets of any insured credit union in any case in which—
>
> > (A) the Board determines that such action is necessary to conserve the assets of any insured credit union or to protect the Fund or the interests of the members of such insured credit union;

12 U.S.C. § 1786(h)(1)(A). The Board's powers as conservator are quite broad and encompass taking such action as may be "(i) necessary to put the credit union in a sound and solvent condition; and (ii) appropriate to carry on the business of the credit union and preserve and conserve the assets and property of the credit union." 12 U.S.C. § 1787(b)(2)(D). The Act provides for further incidental powers which allow the Board to "take any action authorized by this chapter, which the Board determines is in the best interests of the credit union, its account holders, or the Board." 12 U.S.C. § 1787(b)(2)(G).

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similarly common bond, that the subscribers are of good character and may represent the group, and that establishment of a credit union is economically prudent. *See* 4A *Federal Procedure* § 8:832 (George L. Bounds et al. eds., 1990). Credit unions which receive a federal charter are provided with federal depository insurance.

Furthermore, the FCUA sets forth provisions concerning contracts which were entered into by the credit union prior to the conservator's appointment. 12 U.S.C. § 1787 (c). These provisions specifically state that, in its discretion, the conservator may disaffirm or repudiate a contract if its performance by the credit union is determined to be burdensome and such repudiation "will promote the orderly administration of the credit union's affairs." 12 U.S.C. § 1787(c)(1). The conservator must exercise this right to repudiate within a reasonable period of time following its appointment. 12 U.S.C. § 1787(c)(2). The liability for repudiation is limited to actual direct compensatory damages which are determined as of the date of the conservator's appointment. 12 U.S.C. § 1787(c)(3)(A).

The Court finds that the statutory language, on its face, is broad enough to encompass collective bargaining agreements, which are inarguably contractual arrangements. The statute explicitly empowers the Board to take whatever action is necessary to put the credit union in a sound and solvent condition, appropriate to carry on the credit union's business and preserve its assets and property. 12 U.S.C. § 1787(b)(2)(D).

The plaintiffs resist this construction of the language on the grounds that a collective bargaining agreement is a different and more important type of contract. In support of this contention, they cite *John Wiley and Sons v. Livingston*, 376 U.S. 543, 550, 84 S.Ct. 909, 914-15, 11 L.Ed.2d 898, 905 (1964), as standing for the proposition that "federal law essentially requires the existence of a collective bargaining agreement, and that such an agreement is not simply an expression of mutual agreement between two parties." Memorandum (Docket Entry No. 66) at 4-5. However, rather than setting forth the expansive conclusion suggested by the plaintiffs, *John Wiley* simply establishes that the duty to arbitrate may survive in some situations in which the ownership or

corporate structure of an enterprise changes.[11] Indeed, inclusion of collecitve bargaining agreements within the scope of the FUCA is more consistent with the explicit statutory language empowering the NCUA to take any necessary and appropriate action to rehabilitate a federal credit union. Rather than remaining silent, one would expect Congress to expressly make an exception for collective bargaining agreements, in light of their unique and important role, if the FCUA was not to encompass such contractual arrangements.

To the extent that the Board's repudiation of a collective bargaining agreement comprises an unfair employment practice and thereby conflicts with the NLRA, the FCUA is presumed to apply since it is the more recent statutory enactment. As noted by the defendants, memorandum (Docket Entry No. 47) at 7, when enacting the FCUA in 1989, Congress was undoubtedly cognizant of the relevant provisions of the NLRA, 29 U.S.C. § 158, which were enacted more than fifty years before.[12] The Court interprets the absence of any language exempting collective bargaining agreements from a conservator's power of contract repudiation to mean that Congress did not intend to create such an exemption.

The plaintiffs seek to invoke liability by offering an interpretation of the FCUA which is narrower than the scope of its language. The Court finds that this interpre-

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[11] Although reiterating that the duty to arbitrate must be founded on a contract, the Supreme Court found that an unconsenting successor to a contracting party may be bound to a contractual arbitration provision. *John Wiley*, 376 U.S. at 550, 84 S.Ct. at 915, 11 L.Ed.2d at 905. In arriving at this conclusion, the Court recognized the unique status and function of a collective bargaining agreement, as well as policy considerations which favor arbitration under such circumstances. *Id.*

[12] The Supreme Court has noted that "it is always appropriate to assume that our elected representatives, like other citizens, know the law." *Cannon v. University of Chicago*, 441 U.S. 677, 696-97, 99 S.Ct. 1946, 1957-58, 60 L.Ed.2d 560, 575-76 (1979).

tation must be rejected, not only because the FCUA includes no language which excludes collective bargaining agreements, but also because it is inconsistent with Congress' general purpose of facilitating stabilization of the credit union structure and increasing availability of loans. Both the plain meaning of the statutory language and its underlying purpose support the conclusion that the FCUA's repudiation provision is applicable to collective bargaining agreements.

This conclusion is further reinforced by Congress' actions in specifically excluding collective bargaining agreements in other statutes which provide for contract repudiation. Moreover, the Supreme Court previously held that the NLRA did not take precedence over a later statutory enactment, Section 365(a) of the Bankruptcy Code. In *NLRB v. Bildisco*, 465 U.S. 513, 521-22, 104 S.Ct. 1188, 1194, 79 L.Ed.2d 482, 492-93 (1983), the Supreme Court determined that the Bankruptcy Code provision allowing a debtor-in-possession to repudiate executory contracts encompassed collective bargaining agreements. Significantly, in 1985 Congress amended the Bankruptcy Code to exempt collective bargaining agreements from the contract repudiation provision. Nonetheless, despite Congress' exposure to the precise issue of whether contract repudiation encompasses collective bargaining agreements, Congress did not include a similar exemption when enacting the FCUA in 1989.

As was the case in *Crandon*, because a literal reading of the FCUA is consistent with Congressional purpose in enacting the statute and is therefore "in 'harmony with what is thought to be the spirit and purpose of the act,' this case presents none of the 'rare and exceptional circumstances' that may justify a departure from statutory language." 494 U.S. at 168, 110 S.Ct. at 1006, 108 L.Ed.2d at 146 (citations omitted). Accordingly, the Court finds that the FCUA takes precedence over the NLRA and specifically permits unilateral repudiation of

collective bargaining agreements by the Board in its efforts to rehabilitate a failing federal credit union. As a result, the Board's actions in making unilateral changes in the terms and conditions of plaintiffs' employment do not comprise unlawful employment practices in violation of the NLRA.[18]

B. *Standard of consideration before repudiation*

The plaintiffs further contend that, if collective bargaining agreements are subject to a conservator's repudiation, a stricter standard of consideration prior to repudiation is required as a result of the special nature of such contracts. Memorandum (Docket Entry No. 66) at 10. They assert that the standard of consideration endorsed by the Supreme Court in *Bildisco* should apply in this situation, which would require that the conservator establish the following elements: (1) the collective bargaining agreement is burdensome; (2) the equities balance in favor of repudiation; (3) reasonable efforts to negotiate a voluntary modification have been made without success; and (4) policy would be served by the repudiation. *Id.* at 11. *See Bildisco*, 465 U.S. at 526-27; 104 S.Ct. at 1196; 79 L.Ed.2d at 491.

The Court agrees with the defendants' assertion that the plaintiffs' reliance on *Bildisco* is misplaced, particularly since several significant differences distinguish the *Bildisco* situation from that before the Court. Although the Bankruptcy Code requires court approval of the repudiation decision, the FCUA permits a conservator to use its discretion in repudiating contracts and requires no court approval. Moreover, Section 365(a) of the Bankruptcy Code provides no standards governing con-

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[18] The Court notes that this conclusion renders moot the second issue posed by the plaintiffs in their motion (Docket Entry No. 65) for partial summary judgment, which alleges that the AGEFCU's actions violated the NLRA. *See* memorandum (Docket Entry No. 66) at 9-10.

tract repudiation, while the FCUA explicitly provides a governing standard. 12 U.S.C. § 1787(c). The FCUA expressly authorizes a conservator to repudiate a contract if its performance is determined to be burdensome and its repudiation "will promote the orderly administration of the credit union's affairs." 12 U.S.C. § 1787(c)(1).

The Court finds that imposition of the Bankruptcy Code's standard for repudiation is simply inapplicable to repudiation pursuant to the FCUA, which explicitly sets forth its own standard. As a result, the Court shall deny that portion of the plaintiffs' partial summary judgment motion.

IV.

The plaintiffs also assert that the defendants violated the due process rights of some plaintiffs by terminating their employment without prior notice or a hearing. Memorandum (Docket Entry No. 66) at 14. The validity of their constitutional claim hinges upon the plaintiffs having a property right in continued employment. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538, 105 S.Ct. 1487, 1491, 84 L.Ed.2d 494, 501 (1985). As noted by the Supreme Court, such "[p]roperty interests are not created by the Constitution, 'they are created and their dimensions are defined by existing rules or understanding that stem from an independent source such as state law . . . .'" *Id.* (citing *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548, 561 (1972)).

As was the case in *Chilingirian v. Boris*, 882 F.2d 200, 204 n.6 (6th Cir. 1989), the plaintiffs' reliance on *Loudermill*, which dealt with due process rights of individuals deprived of property rights in continued public employment recognized under state law, is misplaced since no such rights are implicated in this action. The plaintiffs attempt to invoke the NLRA as the independent source which confers property rights since it prohibits an employer from making unilateral changes in terms and

conditions of employment when a collective bargaining agreement exists, which in this case provided that no employee would be terminated without just cause. In essence, the plaintiffs' argument is that "the collective bargaining agreement creates a property interest in continued employment, and the NLRA provides federal protection for this property interest." Memorandum (Docket Entry No. 66) at 14.

However, this argument ignores the fact that a collective bargaining agreement is substantially different from a property interest in employment which is conferred by a state or federal legislature. In this instance, the collective bargaining agreement was a contractual relationship between a private employer and its employees and, as such, was incapable of conferring any constitutional property or due process right upon the employee. *See, e.g., Meleen v. Hazelden Found.*, 740 F. Supp. 687, 893 (D. Minn. 1990), *aff'd*, 928 F.2d 795 (8th Cir. 1991).

Likewise, the NLRA does not confer such a property interest in employment. Rather, the NLRA safeguards employees' rights to organize, bargain collectively and strike, 29 U.S.C. § 157, and prohibits an employer's interference with exercise of those rights. 29 U.S.C. § 158. While the NLRA also prohibits retaliatory discharge, 29 U.S.C. § 158(a)(4), and refusal to bargain collectively, 29 U.S.C. § 158(a)(5), the statute does not dictate the terms of the collective bargaining agreement, nor does it prohibit termination for other than cause. Rather, it simply establishes a framework within which the parties condition their working relationship.

The NLRA's establishment of employees' rights to self-organize and bargain collectively is substantively different from a welfare recipient's claim of entitlement to welfare benefits that is grounded in the statute defining eligibility. *Roth*, 408 U.S. at 577, 92 S.Ct. at 2709, 33 L.Ed.2d at 561. Although the NLRA clearly articulates and pro-

tects the employee's right to bargain collectively,[14] it does not confer any entitlement to employment nor any other fruits of the collective bargaining negotiations. Thus, the NLRA is not the independent source of law, comprising the "rules or understandings that secure certain benefits and that support claims of entitlement to those benefits" of an independent source, required by the Supreme Court. *Id.*

V.

The Court must determine who are the proper parties in this ERISA action, in light of the parties' disagreement concerning the following specific issues: (1) whether the plaintiff, the Union, has standing to sue as a representative of the individual employee plaintiffs under ERISA; and (2) whether AGEFCU is an appropriate ERISA defendant.

A.

The defendants contend that the Union lacks standing to assert claims on behalf of its union members under ERISA. Defendants' memorandum (Docket Entry No. 47) at 9-10. In contrast, the plaintiffs insist that union representation of employees in this situation is appropriate and, therefore, the Union has standing to sue on behalf of the individual employees pursuant to ERISA. Plaintiffs' memorandum (Docket Entry No. 66) at 15-16.

The Court once again looks to the statutory language in making its determination. ERISA specifically provides that a civil action may be brought by a participant, bene-

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[14] The LMRA defines collective bargaining as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party." 29 U.S.C. § 158(c). The statute goes on to state that "such obligation does not compel either party to agree to a proposal or require the making of a concession." *Id.*

ficiary, fiduciary or the Secretary of Labor. 29 U.S.C. § 1132. *See also Waxman v. Luna*, 881 F.2d 237, 240 (6th Cir. 1989) (plaintiff must be either participant or beneficiary to bring ERISA action). The statute includes a separate section which defines each of these terms. A "participant" is defined as "any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan." 29 U.S.C. § 1002(7). The term "beneficiary" refers to "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." 29 U.S.C. § 1002(8). The pertinent portions of ERISA provide that a person is a "fiduciary" to the extent he or she exercises discretionary authority or control over the plan's management, exercises any authority or control concerning management or disposition of the plan's assets, or has any discretionary authority or responsibility in the plan's administration. 29 U.S.C. § 1002(21)(A)(i), (iii).

It is clear that the Union is not a participant as defined by ERISA, since it is not an employee, former employee, member or former member of an employee organization with eligibility to receive benefits. It is conceivable that, under certain circumstances, the Union could be a beneficiary or fiduciary since ERISA further clarifies that the term "person" as used therein encompasses an employee organization, 29 U.S.C. § 1002(9), which specifically includes "any labor union" within its definition. 29 U.S.C. § 1002(4). However, there has been no claim that the Union is designated by any participant as a beneficiary nor any suggestion that the Union possesses or has exercised any responsibility or authority concerning the employee benefit plan, its administration or management, or disposition of its assets. Therefore, the Union, simply by virtue of its status as a labor union, does not fall within those who are designated by the statute as capable of bringing an ERISA action. *See, e.g., New Jersey*

State AFL-CIO v. New Jersey, 747 F.2d 891, 893 (3d Cir. 1984) ("It is clear from the statute that labor unions are neither participants nor beneficiaries").

Nonetheless, the plaintiffs contend that the rationale employed by the United States Court of Appeals for the District of Columbia Circuit in *OPEIU v. FDIC*, 962 F.2d 63 (D.C. Cir. 1992), is applicable in this action and, therefore, the Union should be allowed to sue as a representative of the individual union members. In *OPEIU*, the Court found that union representation of employees in claims under the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), 12 U.S.C. § 1821, was appropriate despite the fact that a labor organization did not fall within the technical definitions of "claimant" or "creditor" under the statute. 962 F.2d at 67.

In this action, the plaintiffs suggest that because the Union, which is the federally sanctioned representative of the individual employees, negotiated the contract delineating the pension plan benefits, it is best qualified to represent the employees in claims based on those benefits. Memorandum (Docket Entry No. 66) at 16. However, the Court is unpersuaded by the plaintiffs' proffered analogy, particularly in view of the significant differences between the federal statutes at issue in *OPEIU* and the present cause of action. As an initial matter, the Court notes that the FIRREA does not define the terms "claim," "claimant," or "creditor" within its statutory language. *See OPEIU*, 962 F.2d at 66. In addition, as noted by the District of Columbia Circuit, "FIRREA's very text appears to contemplate claims beyond those by 'creditor[s] . . . on the . . . books' to whom statutory notice muse be sent." *Id.* at 67.

In contrast, ERISA's statutory framework lists those persons empowered to bring a civil action with particularity, 29 U.S.C. § 1132, and devotes an entire section to the specific definitions to be used in application of the

statute. 29 U.S.C. § 1002. Significantly, although the term "employee organization" is specifically defined, 29 U.S.C. § 1002(4), it remains conspicuously absent in the delineation of those who may bring a civil action. Despite the fact that an ERISA claim may derive from a collective bargaining agreement negotiated by a union, Congress has obviously chosen not to include a labor union as an appropriate party to vindicate employees' rights under ERISA.

In addition, as pointed out by the District of Columbia Circuit in its *OPIEU* analysis, the common use in bankruptcy law of such terms as "claimant" and "creditor" makes it a more valuable source of law from which to draw in order to clarify and apply FIRREA. 962 F.2d at 68. In *OPIEU*, the Court considered it "significant that bankruptcy courts appear routinely to permit unions to file claims for benefits on employees' behalf." *Id.* Not only is there no need to draw from another source of law in this action since the relevant statute clearly sets forth who may bring an ERISA action, there is before the Court no evidence of a similar historical connection which would justify going beyond the statutory language and allowing a union to file an ERISA claim on behalf of an individual member.

Accordingly, the Court finds that because the Union does not fall within the categories enumerated by the statute as having the power to bring an ERISA action, it has no standing and the defendants' motion for partial summary judgment on this issue shall be granted.

B.

The defendants further contend that AGEFCU is not a proper party defendant to the plaintiffs' claims pursuant to 29 U.S.C. § 1132(a)(1)(B)[15] because it is merely

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[15] The defendants do not argue that AGEFCU is not a proper party defendant for the plaintiffs' retaliatory discharge claims, pursuant to 29 U.S.C. § 1140. Since an employer is the liable party

the current or former employer of the individual plaintiffs and does not administer the plan. Defendants' memorandum (Docket Entry No. 47) at 10. The plaintiffs, however, assert that AGEFCU is an appropriate ERISA defendant because it has control and plays an active role in administering the plan. Plaintiffs' memorandum (Docket Entry No. 66) at 16-17.

Ordinarily, an employer which established an employee benefit plan is not a proper party defendant to an ERISA action to recover benefits under the plan. 27 *Federal Procedure* § 61:177 (Thomas J. Goger et al. eds., 1984). The proper defendants are the employee benefit plan itself and the trustees who administer the plan, *Carter v. Montgomery Ward and Co.*, 76 F.R.D. 565, 568 (E.D. Tenn. 1976), and the employer may not be made a party defendant without evidence that it controls and/or administers the plan. *Foulke v. Bethlehem 1980 Salaried Pension Plan*, 565 F. Supp. 882, 883 (E.D. Penn. 1983); *Boyer v. J.A. Majors Co.*, 481 F. Supp. 454, 458 (N.D. Ga. 1979). The United States Court of Appeals for the Sixth Circuit has specifically held that the employer is not a proper party defendant in an ERISA action concerning benefits unless its control over administration of the plan is demonstrated. *Daniel v. Eaton Corp.*, 839 F.2d 263, 266 (6th Cir.), *cert. denied*, 488 U.S. 826, 109 S.Ct. 76, 102 L.Ed.2d 52 (1988).

ERISA specifically defines the term "administrator" as "the person specifically so designated by the terms of the instrument under which the plan is operated." 29 U.S.C. § 1002(16)(A)(i). The statute further provides that the plan sponsor is the administrator in the event no adminis-

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defendant in an action alleging retaliatory firing as a result of one's exercise of rights protected by ERISA, *Bittner v. Sadoff and Rudoy Indus.*, 490 F. Supp. 534, 536 (E.D. Wis. 1980), AGEFCU is a proper party defendant in regard to plaintiff Lavender's retaliatory discharge claim.

trator is designated by the operational documents.[16] 29 U.S.C. § 1002(16)(A)(ii). *See also Boyer*, 481 F. Supp. at 458 ("only if an administrator is not so designated is the 'plan sponsor' (the employer) deemed to be the administrator") (citing 29 U.S.C. § 1002(16)).

Despite their claim that AGEFCU had control and took an active part in administering the pension plan, the plaintiffs have failed to identify specific evidence in support of this assertion. However, the Court notes the existence of documents written on AGEFCU letterhead which detail modifications undertaken by AGEFCU. A number of these documents were written and circulated by Jerry Sweet, apparently in his official capacity as president of AGEFCU. *See* complaint (Docket Entry No. 1), exhibits A-C, G. As was the case in *Foulke*, 565 F. Supp. at 883, such documents comprise evidence that AGEFCU may have taken an active role in the administration of the benefits programs offered to its employees.

Based upon the evidence before the Court, AGEFCU's motion for partial summary judgment on the basis that it is not a proper party defendant in the plaintiffs' ERISA action will be denied. *Id.; Barrett v. Thorofare Markets, Inc.*, 452 F. Supp. 880, 884 (W.D. Penn. 1978); *Carter*, 76 F.R.D. at 568.

VI.

The defendants contend that the state wrongful termination claim of plaintiff Tamala Lavender should be dismissed because it is pre-empted by ERISA.[17] The Court finds that this contention has substantial merit.

In order to promote uniformity in the administration of employee benefit plans under ERISA, Congress enacted

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[16] The statute also provides for the contingency where the plan sponsor cannot be identified, indicating that in such a situation, the administrator is "such other person as the Secretary may by regulation prescribe." 29 U.S.C. § 1002(16)(A)(iii).

[17] The plaintiffs have offered no response to this assertion.

a pre-emption provision that prohibits the application of any state law which "relates" to the benefit plan. The statutory language provides as follows:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. . . .

29 U.S.C. § 1144(a). Therefore, a state law which relates to an employee benefit plan is pre-empted by ERISA. The Supreme Court has clarified the meaning of the phrase "relates to" in the context of ERISA, defining it as having "a connection with or reference to" an employee benefit plan. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139, 111 S.Ct. 478, 482, 112 L.Ed.2d 474, 484 (1990) (citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97, 103 S.Ct. 2890, 2900, 77 L.Ed.2d 490, 501 (1983)). Thus, ERISA pre-emption may apply "even if the law is not specifically designed to affect such plans, or the effect is only indirect." *Ingersoll-Rand*, 498 U.S. at 139, 111 S.Ct. at 482, 112 L.Ed.2d at 484.

The Supreme Court has specifically held that ERISA pre-empts a wrongful termination claim which requires that a court's inquiry be directed to the plan. *Id.* at 140, 111 S.Ct. at 483, 112 L.Ed.2d at 485. In this cause of action, plaintiff Lavender contends that her employment was terminated in retaliation for submitting health insurance claims. Third amended complaint (Docket Entry No. 51) ¶ 25. This state claim obviously "relates to" plaintiff Lavender's employee benefits plan by virtue of the claim's obvious connection with or reference to the plan.

In *Ingersoll-Rand*, the Supreme Court also found that, even if express pre-emption were not present, the state

cause of action would be pre-empted "because it conflicts directly with an ERISA cause of action." 498 U.S. at 143, 111 S.Ct. at 484, 112 L.Ed.2d at 486. As in *Ingersoll-Rand,* plaintiff Lavender's wrongful discharge claim falls squarely within the purview of ERISA, which provides in pertinent part as follows:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . . .

29 U.S.C. § 1140. Thus, the statutory language explicitly protects a participant from termination in retaliation for exercise of rights under the employee benefits plan. As noted by the Supreme Court, Congress intended ERISA's civil enforcement mechanism, 29 U.S.C. § 1132(a), to be "the exclusive remedy for rights guaranteed under ERISA, including those provided by § 510 [29 U.S.C. § 1140]." *Ingersoll-Rand,* 498 U.S. at 144, 111 S.Ct. at 485, 112 L.Ed.2d at 487.

As was the case in *Ingersoll-Rand,* plaintiff Lavender's state wrongful discharge cause of action purports to provide a remedy for the violation of rights expressly protected by ERISA, 29 U.S.C. § 1140, the exclusive enforcement of which must be pursuant to 29 U.S.C. § 1132(a). 498 U.S. at 145, 111 S.Ct. at 486, 112 L.Ed.2d at 488. Since such rights are protected and enforceable pursuant to ERISA, pre-emption applies. Accordingly, the defendants' motion for partial summary judgment on plaintiff Lavender's state wrongful discharge claim shall be granted.

VII.

In Count Five of the third amended complaint (Docket Entry No. 51), the plaintiffs allege that the defendants' actions constitute a violation of Tenn. Code Ann. § 47-

50-109.[18] In response, the defendants assert that this allegation fails to state a claim and, therefore, they are entitled to summary judgment on that particular claim. The plaintiffs have offered no reply to the defendants' contention.

The state statute at issue provides that procurement of breach of contracts is unlawful and reads in pertinent part as follows:

> It shall be unlawful for any person, by inducement, persuasion, misrepresentation, or other means, to induce or procure the breach or violation, refusal or failure to perform any lawful contract by any party thereto . . . .

Tenn. Code Ann. § 47-50-109. This statute represents a codification of the state common law action for inducement to breach a contract. *Polk and Sullivan, Inc. v. United Cities Gas Co.*, 783 S.W.2d 538, 542 (Tenn. 1989); *Woods v. Helmi*, 758 S.W.2d 219, 224-25 (Tenn. App. 1985). In Tennessee, a party cannot be liable for inducing his own breach of contract. *Koehler v. Cummings*, 380 F. Supp. 1294, 1313 (M.D. Tenn. 1974).

Pursuant to 12 U.S.C. § 1786(h)(1)(A), the Board appointed itself as conservator of AGEFCU, thereby taking over possession and control of the credit union's business and assets. The FCUA explicitly states that the Board shall, "by operation of law, succeed to (i) all rights, titles, powers, and privileges of the credit union," 12 U.S.C. § 1787(b)(2)(A), and that the Board may "perform all functions of the credit union in the name of the credit union." 12 U.S.C. § 1787(b)(2)(B)(iii).

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[18] The Court notes that the plaintiffs state that the defendants' actions "constitute a refusal or failure to perform a lawful contract and thus are in violation of TCA [sic] Section 47-50-109." However, as discussed below, the statutory language does not encompass the mere refusal or failure to perform a contract; rather, it prohibits inducement or procurement of the breach, refusal or failure to perform any lawful contract by a party.

It is thus clear that any actions taken by the Board following its appointment as conservator of AGEFCU constituted exercise of the credit union's rights and performance of its functions.

Under Tennessee law, the plaintiff must prove the following elements in order to prevail in an action for inducement to breach a contract:

> (1) that there was a legal contract; (2) that the wrongdoer had sufficient knowledge of the contract; (3) that the wrongdoer intended to induce its breach; (4) that the wrongdoer acted maliciously; (5) that the contract was breached; (6) that the act complained of was the proximate cause of the breach; and (7) that damages resulted from the breach.

TSC Indus., Inc. v. Tomlin, 743 S.W.2d 169, 173 (Tenn. App. 1987). Even if the state statute applied to the lawful repudiation of a collective bargaining agreement,[19] since the Board's repudiation was on AGEFCU's behalf, its actions are correctly attributed to AGEFCU rather than to the Board for the purpose of proving a violation of the state statute. Therefore, the Board can not be said to have induced AGEFCU to take any action.

In addition, because federal law provides that a contract may be lawfully repudiated by a conservator of a credit union, it is questionable that a number of the above-cited required elements can be established. For example, following a conservator's lawful repudiation of a contract, a legal, enforceable contract no longer exists. A conservator which is acting pursuant to federal law can hardly be characterized as a "wrongdoer." Likewise, since a conservator acts in the best interests of the federal credit union, the plaintiff's burden of proving malice would appear to be insurmountable.

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[19] The Court need not address this issue since the state statute is inapplicable in light of the fact that any actions taken by the Board were on behalf of AGEFCU.

VIII.

Included in the defendant's motion (Docket Entry No. 46) for partial summary judgment is their motion to strike portions of the plaintiffs' jury demand. Specifically, they contend that the plaintiffs are not entitled to a jury trial on the ERISA claims pursuant to 29 U.S.C. § 1132. The Court finds the defendants' contention to be well-taken.

The Sixth Circuit has held there is no right to a jury trial in actions for recovery of benefits pursuant to 29 U.S.C. § 1132. *Bair v. General Motors Corp.*, 895 F.2d 1094, 1096 (6th Cir. 1990); *Daniel*, 839 F.2d at 268. The *Daniel* Court characterized an action seeking return of mistakenly paid contributions as an action for restitution, which historically "seeks an equitable remedy for which there is no Seventh Amendment right to a jury trial." 839 F.2d at 338. In *Bair*, the Court noted that the breadth of the denial of a right to jury set forth in *Daniel* encompasses all actions for recovery of benefits pursuant to 29 U.S.C. § 1132. *Bair*, 895 F.2d at 1096.

Accordingly, the defendants' motion to strike that portion of the plaintiffs' jury demand related to the cause of action pursuant to 29 U.S.C. § 1132 shall be granted.

IX.

In summary, the Court's determination of the questions of law posed by the parties requires that the plaintiffs' motion for partial summary judgment be granted in part and denied in part. Likewise, the Court shall grant the defendants' motion for partial summary judgment in part and deny it in part. Defendants' motion (*see* motion for partial summary judgment filed August 17, 1993; Docket Entry No. 46) to strike those portions of the plaintiffs' jury demand which relate to their cause of action pursuant to 29 U.S.C. § 1132 shall be granted.

An appropriate order shall be entered.

/s/ Thomas A. Higgins
THOMAS A. HIGGINS
6-21-94
United States District Judge

APPENDIX C

[Entered 9/26/94]

IN THE UNITED STATES DISTRICT COURT
FOR MIDDLE DISTRICT OF TENNESSEE

Civil Action No. 3-92-821

Judge Higgins
Jury Demand

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 737, MARTHA POSTON, VIRGINIA LIGON, SUE DOSS, BRENDA MALEY, GLYNDA JOHNSON, TAMALA LAVENDER, LUCY PINSON, JANICE WEATHERLY, PHYLLIS LAW, DIANE ARMONAT, MARY PEOPLES,
Plaintiffs,

v.

AUTO GLASS EMPLOYEES FEDERAL CREDIT UNION and NATIONAL CREDIT UNION ADMINISTRATION BOARD

ORDER

This cause coming on to be heard on the Motion of Plaintiffs International Union, United Automobile, Aerospace, & Agricultural Implement Workers of America, Local, 737, Martha Poston, Virginia Ligon, Sue Doss, Brenda Maley, Glynda Johnson, Tamala Lavender, Lucy Pinson, Janice Weatherly, Phyllis Law, Diane Armonat, and Mary Peoples under Rule 41(a)(1), and the Court being of the opinion that the Motion of the Plaintiffs is proper;

IT IS ORDERED that Plaintiffs' claims set forth in the Pretrial Order which supplants pleadings as they relate to all claims not previously disposed of by Order of this Court are dismissed with prejudice.

ENTERED THIS THE 23rd DAY OF SEPTEMBER, 1994.

The entry of this order together with the order entered June 22, 1994 (Docket Entry No. 86) shall constitute the judgment in this action. /s/ TPH

/s/ Thomas A. Higgins
JUDGE HIGGINS
United States District Court
of the Middle District of
Tennessee
9-23-94

APPENDIX D

[Entered 6/22/94]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3-92-0821
Judge Higgins

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *et al.*

v.

AUTO GLASS EMPLOYEES FEDERAL CREDIT UNION, *et al.*

ORDER

In accordance with the memorandum contemporaneously entered, the motion (filed August 17, 1993; Docket Entry No. 46) for partial summary judgment of the defendants, Auto Glass Employees Federal Credit Union (AGEFCU) and National Credit Union Administration Board (the Board) is granted in part and denied in part. In addition, the motion (filed September 20, 1993; Docket Entry No. 65) for partial summary judgment of the plaintiffs, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (the Union), Martha Poston, Virginia Ligon, Sue Doss, Brenda Maley, Glynda Johnson, Tamala Lavender, Lucy Pinson, Janice Weatherly, Phyllis Law, Diane Armonat, and Mary Peoples is granted in part and denied in part.

Accordingly, the plaintiffs' claims based upon defendants' repudiation of the collective bargaining agreement as an alleged violation of the National Labor Relations Act, as well as the plaintiffs' claims that the defendants violated the Federal Credit Union Act, are dismissed with prejudice. Likewise, the plaintiffs' claim that the defendants' actions violated their Fifth Amendment property right without due process is dismissed with prejudice.

In addition, the Court grants the defendants' partial summary judgment motion concerning the issue of whether the Union lacks standing to assert the individual plaintiffs' claims pursuant to 29 U.S.C. § 1132(a) and denies the plaintiffs' motion on that same issue. Based upon the evidence before the Court, the plaintiffs' motion for partial summary judgment on the issue of whether AGEFCU is a proper party defendant to the plaintiffs' claims under 29 U.S.C. § 1132 is granted, while the defendants' corresponding motion is denied.

Furthermore, the Court grants those portions of the defendants' partial summary judgment motion relating to the preemption of plaintiff Lavender's state wrongful termination claim and the plaintiffs' failure to state a cause of action pursuant to Tenn. Code Ann. § 47-50-109.

Finally, the Court grants the defendants' motion (*see* motion for partial summary judgment filed August 17, 1993; Docket Entry No. 46) to strike those portions of the plaintiffs' jury demand which relate to their cause of action pursuant to 29 U.S.C. § 1132.

It is so ORDERED.

/s/ Thomas A. Higgins
THOMAS A. HIGGINS
United States District Judge
6-21-94

APPENDIX E

[Filed Feb. 23, 1996]

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 94-6349/6351

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 737, *et al.*,

Plaintiffs-Appellants,

v.

AUTO GLASS EMPLOYEES FEDERAL CREDIT UNION, *et al.*,

Defendants-Appellees.

ORDER

BEFORE: LIVELY, NELSON, and SUHRHEINRICH, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk pe

APPENDIX F

[Entered 8/12/93]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3-92-0821
Judge Higgins

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *et al.*

v.

AUTO GLASS EMPLOYEES FEDERAL CREDIT UNION, *et al.*

ORDER

Before the Court are the plaintiffs' objections [1] (filed July 20, 1993; Docket Entry No. 39) to the Report and Recommendation (entered July 7, 1993; Docket Entry No. 38) and the response (filed July 26, 1993; Docket Entry No. 41) of the defendant, H. Allen Carver.

The Court has independently reviewed the Report and Recommendation, the plaintiffs' objections, defendant's response and the entire record. The plaintiffs' objections are overruled, and the Report and Recommendation is adopted and approved in all respects.

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[1] The Court notes that the plaintiffs do not object to the recommendation of the Magistrate Judge that the motion of the defendant, National Credit Union Administration, be granted. The Court further notes that defendant Carver sought dismissal only insofar as he was sued personally, and this is all the Magistrate Judge recommended.

Accordingly, the motion (filed March 30, 1993; Docket Entry No. 27) of the defendants, National Credit Union Administration and H. Allen Carver, individually, is granted and this action is dismissed as to these two defendants.

It is so ORDERED.

/s/ Thomas A. Higgins
THOMAS A. HIGGINS
United States District Judge
8-10-93

APPENDIX G

[Entered 7/7/93]

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3:92-0821

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 737, *et al.*

v.

AUTO GLASS EMPLOYEES FEDERAL CREDIT UNION, *et al.*

TO: Honorable Thomas A. Higgins, District Judge

REPORT AND RECOMMENDATION

By an Order entered April 26, 1993, the motion of the defendants, National Credit Union Administration and H. Allen Carver, to dismiss (filed March 30, 1993; Docket Entry No. 27) was referred to the Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) for consideration, submission of proposed findings of fact, and recommendation for disposition.

On May 24, 1993, oral arguments were heard on the motion. For the reasons set forth below, I recommend that the motion to dismiss be granted with respect to each of the two defendants.

I. Background Summary

The plaintiffs in this case are the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America Local 737 ["UAW Local 737"], and 11 current or former employees of the Auto Glass Employees Federal Credit Union. The plaintiffs filed their original complaint on September 14, 1992, seeking declaratory and monetary relief for alleged violations of their federal and state constitutional rights, violations of federal statutes, and violations of state law. The complaint sets forth five specific "counts" or causes of action: violation of the plaintiffs' freedom of association rights as guaranteed by the First and Fourteenth Amendments; violation of the plaintiffs' freedom of association rights as guaranteed by Article 1, Section 23 of the Tennessee Constitution; violation of Sections 502(a)(1)(B)[1] and 510[2] of the Employee Retirement Income Security Act of 1974 ["ERISA"], 29 U.S.C. §§ 1001-1461; violation of Sections 301[3] and 302[4] of the Labor Management Relations Act ["LMRA"], 29 U.S.C. §§ 141-187; and violation of T.C.A. § 47-50-109. The named defendants to the original complaint are the Auto Glass Employees Federal Credit Union ["Credit Union"] and the National Credit Union Administration ["NCUA"].

The complaint arises out of events surrounding the conservatorship takeover of the Credit Union by the National Credit Union Administration Board ["Board"]. In December 1991, the Board assumed the role of conservator of the Credit Union pursuant to the authority vested in the Board by the Federal Credit Union Act, specifically 12 U.S.C. § 1786(h). Over the next four months, the Board removed the Credit Union's Board of Directors,

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[1] Title 28 U.S.C. § 1132(a)(1)(B).

[2] Title 28 U.S.C. § 1140.

[3] Title 28 U.S.C. § 185.

[4] Title 28 U.S.C. § 186.

retained Jerry Sweet as President of the Credit Union, and appointed him as Plan Administrator of the Credit Union, made numerous changes in the Credit Union's workplace practices, implemented new wage and benefit packages, and repudiated the collective bargaining agreement which had been in place between the Credit Union and the UAW Local 737.

The plaintiffs contend that the defendants' actions caused the termination, constructive discharge, or permanent lay-off of the 11 named plaintiffs. Further, they assert that the defendants' actions caused detrimental changes in the Credit Union's workplace, including cuts in wages and benefits, termination of grievance procedures, reduced insurance benefits, etc. On May 22, 1992, the UAW Local 737 submitted a claim for damages to the NCUA Region 3 Regional Director, H. Allen Carver, based on repudiation of the collective bargaining agreement. Carver denied the claim on August 3, 1992. Shortly thereafter the plaintiffs filed their original complaint.

On October 16, 1992, the plaintiffs filed their first amended complaint (Docket Entry No. 6). By the amended complaint, the plaintiffs added Jerry Sweet as a defendant in his individual and official capacity. The complaint also requested additional relief and added five new causes of action: that the employee terminations/constructive discharges violated the plaintiffs' Fifth Amendment due process rights; that the repudiation of the collective bargaining agreement violated the plaintiffs' Fifth Amendment due process rights; that the Board's powers under 12 U.S.C. § 1787 are not applicable to the collective bargaining agreement which is exclusively governed by Section 158 of the National Labor Relations Act ["NLRA"], 29 U.S.C. §§ 151-168; that the Board's repudiation of the collective bargaining agreement was improper under 12 U.S.C. § 1787(c)(1); and that the Board's repudiation of the collective bargaining agreement was improper under 12 U.S.C. § 1787(c)(2).

By an Order entered February 23, 1993, (Docket Entry No. 19), the plaintiffs were allowed to add the Board and H. Allen Carver as defendants. On March 9, 1993, the plaintiffs filed their second amended complaint, (Docket Entry No. 22), adding the Board and H. Allen Carver, individually and in his official capacity, as defendants. The second amended complaint is essentially the same as the first amended complaint in all other respects.

The NCUA and H. Allen Carver then filed the pending motion to dismiss. The two defendants seek dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) asserting that the second amended complaint fails to state a claim against them upon which relief can be granted. The NCUA argues that the Board is responsible for the actions complained of by the plaintiffs and there is no factual basis for a claim against the NCUA. With respect to H. Allen Carver, he seeks dismissal in his individual capacity on the ground that he is immune from personal liability for actions taken as an agent for the Board.

The plaintiffs have filed a response to the motion (filed April 19, 1993; Docket Entry No. 30), and the defendants have filed a reply (filed April 20, 1993; Docket Entry No. 31).

II. Motion To Dismiss [5]

The Federal Credit Union Act [the "Act"] 12 U.S.C. §§ 1751-1795(k), governs the organization, establishment, and administration of federal credit unions. The

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[5] On the day of oral arguments, plaintiffs indicated that they had filed a third motion to amend their complaint and argued that under *Thompson v. Superior Fireplace Co.*, 931 F.2d 372, 374 (6th Cir. 1991), a ruling on the motion to dismiss should be delayed until the motion to amend was ruled on. Although the motion to amend still appears to be pending, I have reviewed the third amended complaint (Docket Entry No. 37), and do not find that my recommendation would change because of the most recent amendment to the complaint.

Act creates an independent agency in the executive branch known as the NCUA. Section 1752(a)(a). Management of the NCUA, however, is vested by statute in the NCUAB or "the Board" as it is referred to in the Act, § 1752(a) and (d), and includes, but is not limited to, the authority to adopt rules as it sees fit, keep records, and make reports to Congress and the President concerning the operation of the NCUA. Section 1752(d). Essentially, the Act provides the Board with all powers necessary to enforce and regulate the organization, establishment, and operation of federal credit unions. *See generally* Sections 1766 and 1789.

In this particular case the Board initiated conservatorship proceedings over the Credit Union pursuant to Section 1786(h), which provides that if certain conditions are present, "the Board may, ex parte without notice, appoint itself as conservator and immediately take possession and control of the business and assets of any insured credit union . . . ."

As conservator, the Board has extensive authority under Sections 1786(h), 1787(b), and 1787(c) to operate a credit union it has placed in conservatorship. The Board succeeds to all rights and powers of the credit union. Sections 1786(h)(8) and 1787(b)(2). The Board is explicitly authorized to take actions appropriate to carry on the business of the credit union and preserve the assets and property of the credit union, and necessary to put the credit union in sound and solvent condition. Section 1787(b)(2)(D). The Board is further authorized to exercise incidental powers when it determines them to be in the best interests of the credit union, its account holders, or the Board. Section 1787 (b)(2)(G). Under Section 1787(c), the Board is explicitly provided with the authority to disaffirm or repudiate certain contracts or leases to which the credit union is a party.

NCUA

The NCUA's motion to dismiss argues that the Board has been the actor in this situation and that the plaintiffs' allegations implicate the Board only. The NCUA asserts that it has taken no action upon which the plaintiffs could state a claim, and that it is not a proper defendant to this action.

The plaintiffs cite to *Hafer v. Melo*, —— U.S. ——, 112 S.Ct. 358 (1991), and respond that their official capacity suit against the Board is really a suit against the NCUA and thus the NCUA should remain in this action. The plaintiffs analogize this situation to one where a state official is sued in his official capacity and the action against him in this capacity is actually against the state.

Neither party has cited to any controlling authority, and I have not uncovered any case on point for this issue.[6] I find the NCUA's argument is persuasive, however, and that plaintiffs' response misses the mark. First and foremost, it is the Board who acted as conservator of the Credit Union pursuant to the authority granted by the Act. The Act explicitly sets out that it is the Board who has the authority to initiate a conservatorship, Section 1786(h), and repudiate contracts, Section 1787 (c). All of the actions complained about by the plain-

[6] Several of the Court of Appeals' decisions dealing with the Act on other issues provide little guidance on this particular issue. In *Bingaham v. National Credit Union Admin. Board*, 927 F.2d 282 (6th Cir. 1991), the Board was the named defendant, but the court's opinion frequently referred to actions taken by the NCUA which appear to have actually been actions taken by the Board. In *Waukesha State Bank v. National Credit Union Admin. Board*, 968 F.2d 71 (D.C. Cir. 1992), the Board was a named defendant, but the court's opinion also referred to actions taken by the NCUA which appear to have actually been actions taken by the Board. *Oiciyapi Federal Credit Union v. National Credit Union Admin.*, 936 F.2d 1007 (8th Cir. 1991), in contrast, involved the NCUA as a named defendant, but dealt with liquidation actions taken by the Board.

tiffs are in fact actions taken by the Board or its agents as conservator.

A fair reading of the Act also supports the argument that it is the Board who is the proper party to this action. The Act reveals that Congress contemplated various types of litigation would arise concerning the Act and provided that the Board would act as a party in these situations. The Act provides that in the event that the conservatorship appointment itself is challenged, a show cause order against the Board may be requested from the United States District Court. Section 1786(h)(2)(3). The Board may apply to the United States District Court for enforcement of any effective and outstanding notice or order issued under Section 1786. Section 1786(k). In the event of legal action relating to a conservatorship, the Board may move for a stay of proceedings in any court with jurisdiction over the legal action. Section 1787(b)(12).[7] The Board is required to abide by final, unappealable judgments rendered before its appointment as conservator, Section 1878(b)(13), and is granted all appellate rights of the credit union with respect to appealable judgments. Section 1787(b)(13). The Board may initiate civil damage actions against a director or officer of a credit union for gross negligence. Section 1787(h). Further, the general administrative provisions section of the Act provides that the Board may sue or be sued in any court of law or equity. Section 1789(a)(2).

I find no justifiable reason to keep both the NCUA and the Board in this action as defendants. The plaintiffs have not alleged any facts supporting a claim against the NCUA. Their complaint is in all respects based on actions taken by the Board. Contrary to plaintiffs' assertion, the Board's presence in the action ensures that there is a party against whom plaintiffs' official ca-

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[7] I note that a stay was granted in this action pursuant to the Board's motion. *See* Docket Entry No. 9.

pacity claims can be asserted, as the Board is the government entity involved in this action. The plaintiffs' reliance on *Hafer v. Melo* is simply not relevant as they have sued the government entity involved, the Board.

H. Allen Carver

H. Allen Carver seeks dismissal from this action in his individual capacity based on the argument that he is immune from individual liability for the actions he took as agent for the Board. He is essentially asserting a qualified immunity defense.

It is by now well settled that government officials performing discretionary functions are shielded from liability for civil damages insofar as they act within the scope of their authority and their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). Qualified immunity is available as long as the official could have reasonably thought that his actions were consistent with the rights alleged to have been violated. *Anderson v. Creighton,* 483 U.S. 635, 638 (1987).

The focus of qualified immunity is on the objective reasonableness of the official's actions. Thus, qualified immunity will protect the official unless the rights asserted by the plaintiff were so clearly established at the time the official acted that any officer in the defendant's position would have understood that he was under a duty to refrain from the complained of conduct. *Garvie v. Jackson,* 845 F.2d 647, 649-50 (6th Cir. 1988). The Court must determine whether a defendant violated "clearly established statutory or constitutional rights" at the time the alleged violation occurred. *Harlow,* 457 U.S. at 819. Rights are clearly established through decisions of the Supreme Court, Federal Courts of Appeals, or from the highest court in the state where the case arose. *Robinson v. Bibb,* 840 F.2d 349, 351 (6th Cir. 1988).

In the present action the parties have not disputed that Carver was performing discretionary functions as the Board's agent. The dispute is, therefore, whether or not the rights Carver is alleged to have violated were clearly established at the time he acted.

The plaintiffs allege that their First, Fifth, and Fourteenth Amendment rights, state constitutional rights, various statutory rights, and state contract rights were violated during the conservatorship of the Credit Union. I note that plaintiffs' complaint contains only minimal references to Carver, and the ten specific claims do not mention him by name. However, for the purposes of this motion, I assume that plaintiffs intend to allege that Carver had a role in each of the alleged violations. Nonetheless, I find that the rights alleged to have been violated were not clearly established at the time of Carver's actions and thus, plaintiffs have not defeated Carver's qualified immunity defense. The plaintiffs point to no case law, and I know of none, supporting their contention that the actions taken by the Board as conservator pursaunt to 12 U.S.C. §§ 1786 and 1787 violate any of the federal or state statutory sections they base their complaint on. Similarly, there is no case law supporting the plaintiffs' contention that the Board's repudiation of the collective bargaining agreement pursuant to the authority granted by 12 U.S.C. § 1878(c) violates any Constitutional or statutory rights which the plaintiffs may possess.

Plaintiffs argue that the motion should be denied because they allege violations of their Constitutional rights and set out facts which potentially establish a cause of action against Carver. This is simply not enough to defeat Carver's assertion of qualified immunity. One of the purposes of qualified immunity is to allow government officials to carry out their duties free from the threat of harassing and time consuming litigation. *Garvie v. Jackson,* 845 F.2d 647, 649 (6th Cir. 1983). Thus, an ofcial is shielded from liability unless the illegality of his

action, in light of the pre-existing law, is apparent. *Anderson*, 483 U.S. at 639.

Even assuming that the complained of actions do in fact constitute violations of plaintiffs' rights as they assert, I do not find that an objective official in Carver's position would have reasonably believed that the actions he took as conservator of the Credit Union were in violation of any of the numerous rights plaintiffs' set out in their complaint. The Act gives the conservator broad powers, Sections 1766 and 1789, to preserve the assets and property of a credit union which has become fiscally infirm, and to take those actions necessary to return the credit union to a sound and solvent condition. Section 1787(b)(2)(D). Given these extensive powers to act, and given the lack of case law addressing the relationship of a NCUA conservatorship to the rights asserted by plaintiffs, no reasonable official in Carver's position would have understood that he was violating the rights of the plaintiffs by exercising the powers granted under the Act.

RECOMMENDATION

Based on the foregoing, I respectfully RECOMMEND that the motion to dismiss of the defendants National Credit Union Administration and H. Allen Carver be GRANTED.

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of Court within ten (10) days of receipt of this report, or the proposed findings or recommendation to which objection is made. Failure to file objections within the specified time can be deemed a waiver of the right to appeal the District Court's Order. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

Respectfully submitted,

/s/ Kent Sandidge, III
United States Magistrate Judge